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No.

In the Supreme Court of the United States

GEORGE LUSSIER ENTERPRISES, INC., D/B/A LUSSIER SUBARU
SULLIVAN COUNTY MOTORS, INC., D/B/A SUBARU OF CLAREMONT;
CAMILLERI BROTHERS, INC., D/B/A C&C SUBARU;
KINNEY MOTORS, LTD; REYNOLDS' GARAGE & MARINE, INC.,
PETITIONERS

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH;
JOSEPH A. APPELBE, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the First Circuit affirmed the decision of the United States District Court for the District of New Hampshire that the Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.*, did not prohibit an automobile manufacturer from installing after-market accessories on automobiles, the cost of which could not be passed on to consumers, and then refusing to sell the automobiles to its franchised dealers without these after-market accessories. The Question Presented is:

1. Is "coercion" by a motor vehicle manufacturer, prohibited under the Automobile Dealer Day in Court Act, 15 U.S.C. 1221 *et seq.* ("ADDCA"), limited to violation of a motor vehicle dealer's contractual rights?

PARTIES TO THE PROCEEDING

Bald Hill Realty, Inc. d/b/a Bald Hill Subaru was a party to the proceedings before the First Circuit Court of Appeals, but is not a party to, and has no interest in, this proceeding. The caption of this Petition contains the names of all other parties to the proceeding in the First Circuit Court of Appeals whose judgment is sought to be reviewed. Petitioners submit the following Corporate Disclosure Statement pursuant to Supreme Court Rules 14.1(b) and 29.6:

1. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of George Lussier Enterprises, Inc. d/b/a Lussier Subaru.
2. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Sullivan County Motors, Inc. d/b/a Subaru of Claremont.
3. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Camilleri Brothers, Inc. d/b/a C & C Subaru.

4. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Kinney Motors, Ltd.

5. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Reynolds' Garage & Marine, Inc.

6. As presently advised, there is no parent or publicly held company owning 10% or more of the stock of Bald Hill Realty, Inc.d/b/a Bald Hill Subaru.

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The December 16, 2004 Opinion of the Court of Appeals is reported at *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 2004 U.S. App. LEXIS 26277 (1st Cir. 2004). The Order denying the Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* is unreported. The September 26, 2003 Opinion of the United States District Court for the District of New Hampshire is reported at *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 286 F.Supp.2d 86, 2003 U.S. Dist. LEXIS 17152 (D. N.H. 2003).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on December 16, 2004. A timely Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* was denied on January 21, 2005. The jurisdiction of this Court to review the judgment of the First Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The relevant provisions of the Automobile Dealer Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221 and 1222, are reproduced at Appendix, *infra,* 71-73.

STATEMENT OF THE CASE

Procedural Background

This action was filed in the United States District Court for the District of New Hampshire on March 5, 1999. The District Court had jurisdiction over the action pursuant to 28 U.S.C. §1331, to the extent that petitioners' claims arose from 15 U.S.C. §1221 and other federal statutes, and supplemental

jurisdiction over petitioners' state law claims, pursuant to 28 U.S.C. §1367. The District Court certified a liability-only class of current and former New England Subaru dealers on August 3, 2001.

The parties filed cross motions for summary judgment, and the District Court entered summary judgment in favor of all respondents on October 31, 2003. Petitioners timely appealed the final order, pursuant to 28 U.S.C. § 1291, on November 26, 2003. A panel of the First Circuit Court of Appeals affirmed the decision of the District Court, holding that the Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.*, did not prohibit an automobile manufacturer from installing after-market accessories on automobiles, the cost of which could not be passed on to consumers, and then refusing to sell the automobiles to the dealers without these after-market accessories. The Court of Appeals denied petitioners' Petition for Rehearing by the Panel and Suggestion for Rehearing *En Banc* on January 21, 2005.

Statement of Facts

Subaru of New England, Inc. ("SNE") is the distributor for Subaru automobiles in the six New England states. Petitioners represent a certified class of current and former New England Subaru dealers ("the dealers") who were or are franchisees of SNE, and who challenge SNE's business practices. During most of the class period of 1995 to August, 2001, SNE sold automobiles to the dealers through an allocation formula called Fair Share II, which authorized SNE to hold back, as "discretionary," 11.5% of the cars sold to dealers. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 41 (1st Cir. 2004); Appendix at 23. The other 88.5 % were distributed through an allocation process, which took into account the rate of sales. Essentially, the more cars a dealer sold, the more it received in future allocations. *Id.* Of this 88.5%, cars not sold to the first dealer to whom they were allocated were called "turndown cars." Fair Share II did not specify how turndown cars would be sold, 393 F.3d at 41, 48;

Appendix at 23, and did not give SNE the right to accessorize turndown or discretionary cars. 393 F.3d at 48-49; Appendix at 35. The dealers proved that Subaru of New England pre-accessorized discretionary, turndown, and initial allocation cars[1] with overstocked aftermarket accessories such as leather shift knobs, hood deflectors, altimeters and the like, before selling them to the dealers. If a consumer actually wanted any of these accessories, a dealer could purchase them from SNE or another vendor, and install them at the consumer's request. Joint Appendix before the Court of Appeals ("CA App.") at 2486-2487, 2504, 2516.

Accessories were very profitable for SNE. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 286 F.Supp.2d 86, 91 (D. N.H. 2003), Appendix at 48. Its profit margin on accessories was 30% to 38%, CA App. 2029, 2080, 2579 – 2581, while its profit on cars was only 3%. Through most of the class period, SNE denied that it preaccessorized any cars. 393 F.3d at 42; 286 F.Supp.2d at 92; Appendix at 24, 49-50. In 1999, SNE finally admitted that it "pre-accessorized our demonstrators ... and any discretionary vehicles determined in accordance with current allocation procedures." CA App. 2615. SNE never admitted that it pre-accessorized turndowns in the same manner as discretionary cars. CA App. 2616-2619.

After a lengthy discovery dispute, which resulted in the imposition on SNE of a $40,000 sanction, SNE produced data that confirmed what the dealers had surmised – that SNE preaccessorized over 31.5%, not less than 10% as it had originally contended (CA App. 2638, 2643), of the cars sold during the class period, with approximately $24,000,000 in accessories. The dealers established that discretionary and

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[1] Initial allocation cars were the first month's allocation of every model year. 393 F.3d at 41; Appendix at 23. Although dealers were undisputedly "entitled" to allocation of these cars through the regular allocation system, they were so heavily pre-accessorized that, although they comprised only 1.5% of the cars SNE sold to dealers during the class period, they carried nearly 5% of the accessories sold during that same period. *See* chart below.

turndown cars were simply loaded with whatever was leftover in the warehouse and could not otherwise be sold. CA App. at 2060-2061, 2015; *see* 393 F.3d at 41, 45; Appendix at 24, 29.

From the data, the dealers were able to determine the total dealer cost of accessories installed for each category (discretionary, turndown, regular, initial allocation), and an average accessory cost to dealer per car for each category. 393 F.3d at 43; 286 F.Supp.2d at 91; Appendix at 27, 48. The results are as follows:

Category	# of Cars	Total Accessories	Access. Per Car	% of Total Cars	% of Total Access.
Regular Allocation	85,248	$28,830,830	$338	68.2%	54%
Discretionary Cars	14,359	$10,652,378	$742	11.5%	20%
Initial and Special Models	1,837	$2,499,119	$1,360	1.5%	4.7%
Turndowns	23,159	$11,339,908	$490	18.5%	21.2%
Postal Cars[2]	373	$54,077	$145	0.3%	0.1%
TOTAL	124,976	$53,376,312	$427	100%	100%

SNE did not dispute these calculations at summary judgment (CA App. 2973), and they were accepted by both the District Court and the Court of Appeals. 286 F.Supp.2d at 91; 393 F.3d at 43; Appendix at 27, 48. The dealers produced

[2] These were right-hand drive cars sold to U.S. Postal carriers.

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undisputed evidence that the accessories were undesirable, made the cars harder to sell and their cost could not be passed on to consumers. 393 F.3d at 44, 45; Appendix at 27. In addition, the dealers established through testimony of former SNE employees, corroborated by a regression analysis, that they were forced to purchase accessories on their regular allocation cars in order to obtain access to the turndown or discretionary cars. 286 F.Supp.2d at 92; 393 F.3d at 41-42; Appendix at 27, 48-49.

The dealers had no real choice but to purchase the 31.5% of the cars sold to the dealer class with unsalable accessories pre-installed. Subaru dealers were required to sell nothing but Subaru automobiles in their dealerships. There was a finite pool of Subaru cars available for distribution to New England Subaru dealers. Dealers competed for allocations from this pool by attempting to sell as many cars as possible, as rapidly as possible. A dealer who refused to purchase pre-accessorized cars would obviously lose the profit it would have otherwise have earned from the sale of those refused cars. However, the dealer also lost future allocations of cars, and the profits of the sales of those cars, because it had fewer cars to sell in order to compete for allocations under SNE's so-called "turn and earn" formula.

Moreover, under SNE's Franchise Agreement, dealers were required to "achieve...a level of [new car] registrations on an annual basis in the Area of Responsibility reasonably comparable...to that attained on the average by all other dealers...in their respective areas of responsibility." CA App. 1003. SNE took the position that dealers not meeting this standard were "under-performers" who were deserving of "aggressive action," including termination. Obviously, in order to achieve sales performance that is reasonably comparable to the average sales performance of other dealers, a dealer must have a supply of cars reasonably comparable to that of other dealers. In sum, the dealers had no real choice but to purchase the 31.5% of cars that SNE denominated as "turndown" or "discretionary," with the unsalable accessories pre-installed. If

they did not do so, they would be caught in a downward allocation spiral which would jeopardize their ability to achieve their required sales performance. This case thus presents the stark question of whether an automobile manufacturer may condition the dealer's purchase of essential inventory on purchasing accessories that are of no value to the dealer.

REASONS FOR GRANTING THE WRIT

This case provides the Court with the opportunity to restore a reasonable, easily applied test to determine whether conduct of automobile manufacturers toward their dealers is "coercive" in violation of the Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.* ("ADDCA"). The ADDCA regulates, and prevents abuses in, the American automobile franchise system. Its vitality and importance to this microcosm of American commerce is demonstrated by Congress's continuing attention; it was amended as recently as November, 2002 to ameliorate one-sided arbitration provisions in automobile franchise contracts. *See* 15 U.S.C. §1226.

SNE, the New England distributor of Subaru automobiles, embarked on an "option-packing" scheme, whereby it made nearly one-third of the cars it sold to the dealer class available only with expensive and unwanted pre-installed accessories, the cost of which could not be passed on to consumers. Apparently believing that its practice violated state and federal laws, SNE denied its practices to the dealers for years.

Nearly forty years ago, the First Circuit Court of Appeals announced a practical, bright-line test to determine whether manufacturer conduct constituted "coercion" in violation of the ADDCA. If compliance with the manufacturer's demands on the dealer would benefit both parties, the demand was reasonable incentive; if compliance benefitted primarily the manufacturer, to the detriment of the dealer, then the demand was coercive. *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437, 442 (1st Cir.), cert denied, 385 U.S. 919 (1966).

The *Rohlsen* test has been widely adopted and quoted by other Courts of Appeals and District Courts.

However, the very Court of Appeals that had first announced this "one-sided benefit" test abruptly abandoned it in the proceedings below, pronouncing it "mere *dicta*." *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 45, Appendix at 30. At the same time, it provided no clear alternative for discerning coerciveness under the ADDCA. The Court of Appeals upheld SNE's option-packing practice because the dealers were not "contractually entitled" to the third of the cars offered only with pre-installed accessories. The opinion of the Court of Appeals means that the ADDCA provides dealers no more protection than does the franchise contract itself – a conclusion plainly at odds with the decisions of two other Circuit Courts of Appeal, numerous District Courts, and with the legislative history of the ADDCA itself.

I.
The Critical Economic Interests at Issue.

In 2003, the sale of automobiles in the United States was an $800 billion dollar industry. U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States: 2004-2005*, No. 1020 (124th Ed.). Virtually all new automobiles in the United States are sold through a franchise system—a system designed by automobile manufacturers in the early part of the 20th century to allow them effectively to distribute, sell and service their products without incurring the enormous capital costs of establishing a national distribution network.

There were 21,650 franchised new automobile dealers in the United States in 2003. U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States: 2004-2005*, No. 1027 (124th Ed.). The relationship between each one of these dealers and its manufacturer-franchisor is governed by the provisions of the ADDCA. Further, thirty-seven of the fifty states have enacted cognate statutes that provide automobile dealers with explicit protection from the

worst abuses of manufacturers. Various District Courts and Courts of Appeal have specifically held that the standard for determining coercion under the ADDCA and a particular cognate statute is the same. *See, e.g., Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876 (5th Cir. 1989); *Gage v. General Motors Corp.*, 796 F.2d 345, 350-51 (10th Cir. 1986); *Subaru Distributor Corp. v. Subaru of America*, 47 F.Supp.2d 415, 465, n.9 (S.D.N.Y. 1999); *Colonial Dodge, Inc. v. Chrysler Corporation*, 11 F.Supp.2d 737 (D. Md. 1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997). Here, the First Circuit broadly stated that "courts have consistently held that 'coercion' under state dealer statutes holds the same meaning as under the ADDCA," and specifically so held with regard to the statutes of the six New England states. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 47, Appendix at 32. *See also Bishay v. American Isuzu Motors, Inc.*, Nos. 04-1392 and 04-1393, 2005 U.S. App. LEXIS 5616 (1st Cir. Apr. 7, 2005) at *10-11 (citing its opinion in *Lussier* as support for relying on ADDCA case law to interpret Massachusetts statute's definition of "motor vehicle dealer").

If the test for "coercion" is the same under both the ADDCA and the state statutes (a conclusion that Petitioners challenged below but do not raise here), then the decision below has profound and far-reaching consequences. A clear understanding of just what protection from coercion is offered by the ADDCA and the laws of 37 states is essential to the ability of those engaged in this bellwether industry to understand their rights and obligations. Clarity of the law is essential to guide, and hopefully prevent, manufacturer-dealer litigation in not only the federal District Courts and Courts of Appeal, but in the state courts.

II.
This Case Presents the Important Judicial Question of the Meaning of "Coercion" Under the Automobile Dealer Day in Court Act.

The concept of "coercion," although not immediately visible on the surface of the ADDCA, is at its heart. 15 U.S.C. §1222, the provision granting a cause of action under the ADDCA, allows a automobile dealer to sue its manufacturer-franchisor for "the failure of said automobile manufacturer...to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer...." Appendix, *infra* at 73. 15 U.S.C. §1221 defines "good faith" as follows:

> the duty of each party to any franchise...to act in a fair and equitable manner toward each other so as to guarantee the one party *freedom from coercion*, intimidation, *or threats of coercion* or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

Appendix, *infra* at 71 (emphasis added). The genesis of the ADDCA and state motor vehicle franchise laws has been the manufacturers' abuse of their superior economic power to take unfair advantage of their dealers, including with regard to unwanted vehicles parts and accessories. The motor vehicle franchise system allows manufacturers to avoid the large capital investment in sales outlets and service facilities necessary to satisfy consumer demand, by shifting these investment costs to their dealers. Note, *State Motor Vehicle Franchise Legislation: A Survey And Due Process Challenge To Board Composition.* 33 Vand. L.Rev. 385, 387 (1980). Stewart Macaulay, *Law And The Balance Of Power: The Automobile Manufacturers And Their Dealers*, at 6 (1966). This investment makes the dealer dependent on the manufacturer and subject to its dictates,

whether or not they are fair and reasonable. Macaulay at 11-12, *see also* H. Brown, *A Bill of Rights for Auto Dealers,* 12 B.C. Ind. and Comm. L. Rev. 757, 760 (1971). In his dissenting opinion in *Ford Motor Company v. United States,* 335 U.S. 303, 323 (1948) Justice Black noted that "dealers are thus economic dependents of the company whose cars they sell."

The Automobile Dealer Day in Court Act, 15 U.S.C. §1221 *et seq.*, was enacted in 1956 to level the playing field between automobile dealers and their franchisers. It is designed to reach "border-line antitrust violations," *Buono Sales Inc. v. Chrysler Motor Corp.* 449 F.2d 715, 724 (3d Cir. 1971), arising out of the manufacturer's control over its product in what amounts to a quasi-integration to the retail level of distribution. *Northview Motors, Inc. v. Chrysler Motors Corp.* 227 F.3d 78, 92-93 (3d Cir. 2000).

The legislative history of the ADDCA, which was not addressed either by the District Court or the Court of Appeals, demonstrates that Congress was particularly concerned about the very practice at issue here: a manufacturer's insistence that its dealers accept unwanted accessories.

> Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, *or sell a specified quota of, parts, accessories*, and tools made or approved by the manufacturer.

H.R. Rep. No. 2850, 84th Cong., 2d Sess. 1956, 1956 U.S.C.C.A.N. 4596, 4603 (emphasis added.) Following enactment of the Act, the Courts of Appeal had no difficulty in recognizing that it prohibited the practices revived here by SNE:

> [O]ne of the principal evils which the Act was designed to remove was the exertion of pressures by the dominant automobile manufacturers upon dealers to accept automobiles, *parts, accessories*, and supplies

> which they neither needed nor wanted and which they felt their market would not absorb.

Woodard v. General Motors Corp., 298 F.2d 121, 128 (5th Cir. 1962) (emphasis added), (*citing* S.Rep. No. 2073, 84th Cong., 2d Sess. 2). *See also David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 56 and n. 7 (4th Cir. 1974) (manufacturer pressure to accept accessories can constitute coercion).

Good faith, or rather the manufacturer's lack of it, is the gravamen of an ADDCA claim. Under the ADDCA, "[L]ack of good faith ... must be found in the context of actual or threatened coercion or intimidation." *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1056 (1st Cir. 1985) (citations omitted). Coercion under the ADDCA is defined as the manufacturer's wrongful demand accompanied by threat of sanctions. Id.

Just how coercion is to be defined is the critical aspect of this case. Ironically, the seminal ADDCA case, which formed the generally accepted rule of what constituted coercion under the Act, was decided in the same First Circuit Court of Appeals that later rejected it. *Volkswagen Interamericana, S. A. v. Rohlsen*, 360 F.2d 437 (1st Cir.) *cert denied*, 385 U.S. 919 (1966). *Rohlsen* discerned that, where compliance with a manufacturer's demand would benefit the dealer as well as the manufacturer, the demand is incentive, not coercive. However, where the demand benefits solely or primarily the manufacturer, it crosses the line into coercion. The Court noted:

> Particularly suspect under the act are conditions which benefit only, or primarily, the manufacturer -- for example, requirements that a dealer purchase large stocks of vehicles, *spare parts, special tools* or advertising matter -- as distinguished from requirements that would tend to work to the mutual advantage of both parties, for example, that the dealer improve its service, or managerial efficiency. The

> manufacturer can easily extort demands of the first sort, increasing its own profit at the expense of the dealer's; the act's legislative history indicates that this was of particular concern to the Congress.

Rohlsen, 360 F.2d at 442 (emphasis added), *quoted in part in Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985).

Rohlsen's succinct and sensible standard -- mutual benefit reflects permissible incentive, while one-sided benefit to the manufacturer reflects coercion -- made it a bellwether of ADDCA jurisprudence. *Rohlsen* has been cited in no fewer than 83 cases, and its one-sided benefit language has been quoted and adopted by a number of other Circuit and District opinions, including the Eleventh and Second Circuits, *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985) (quoted); and *Autowest, Inc. v. Peugot, Inc.*, 434 F.2d 556, 561-562 (2nd Cir. 1970) (paraphrased and applied; and numerous District Courts: *General Motors Corp. v. Villa Marin Chevrolet, Inc.*, No. 98-cv-5206, 2000 U.S. Dist. Lexis 2772 (E.D.N.Y. March 7, 2000) at *57-58 (quoted); *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F.Supp. 2d 737, 745 (D. Md. 1996) (quote within quote); *K&H Kawasaki v. Yamaha Motor Corp.*, No. 95-cv-1824, 1997 U.S. Dist. LEXIS 5171 (N.D.N.Y April 14, 1997) at *14 (quoted); *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F. Supp. 1121, 1134 (D.R.I. 1982) (quoted); *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519, 532 (S.D.N.Y. 1972) (quote within quote); *Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, No. 98-cv-6141, 2000 U.S. Dist. Lexis 22130 (S.D.N.Y. Sept. 1, 2000) at *22 (quoted in part); *Martin Motor Sales, Inc. v. Saab–Scania of America, Inc.*, 452 F. Supp. 1047, 1051 (S.D.N.Y. 1978) (quoted in part); *Chinetti-Garthwaite Imports, Inc. v. Ferrari Societa per Azioni Fabbriche Automobili e Corse,* 463 F. Supp. 73, 79 (E.D. Pa. 1978) (paraphrased); *see also State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 414 (10th Cir. 1984) (distributors generally); *and Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 792

N.E.2d 488, 497 (Ill. App. 2003) (quoted, discussing Illinois cognate statute).

III.
The Court of Appeals Erred in Abandoning its Own Sensible and Widely Accepted Standard.

The Court of Appeals, however, concluded that the *Rohlsen* one-sided benefit analysis, quoted substantively or paraphrased in 10 other cases, was "mere dicta." *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 45; Appendix at 30. The Court of Appeals continued, "we have now clarified that good faith under the ADDCA requires a showing of (1) wrongful conduct coupled with (2) sanctions," and concluded that in order to succeed on an ADDCA claim, a dealer must demonstrate that the manufacturer's sanctions encroach on something, such as allocation of vehicles, that dealers are *legally entitled* by their contracts to receive. 393 F.3d at 46; Appendix at 28.

The ADDCA's legislative history demonstrates that the demand to accept unwanted accessories, or accessory quotas, is "one of the principal evils which the Act was designed to remove ...." *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir. 1962); *see also* H.R. Rep. No. 2850, 84th Cong., 2d Sess. 1956. Indeed, one of the demands identified in *Rohlsen* as "directly benefiting the manufacturer, but not necessarily the dealer" was a requirement that the dealer "stock spare parts equal in cost to ten percent of the value of its automobile stock." *Rohlsen,* 360 F.2d at 442. SNE's inventory dumping is essentially a requirement that the dealers purchase large stocks of spare parts – with the cars attached.

The Court of Appeals purported to rely on *Cabriolet Porsche Audi, Inc. v. America Honda Motor Co.*, 773 F.2d 1193, 1209-11 (11th Cir. 1985), in which a distributor's offer of extra cars beyond the regular allocation process in return for the dealer establishing an exclusive facility - an infrequent offer that would not affect the dealer's day-to-day ability to compete

with other dealers- did not amount to coercion violative of the ADDCA. The Court of Appeals ignored a critical difference in this case: over 30% of the SNE's cars were sold to the dealer only if the dealer agreed to pay for the unsalable and worthless accessories that were pre-installed on the cars. The Court of Appeals quoted an excerpt from *Cabriolet* in support of its view:

> [W]e have little doubt that had [the distributor] threatened to deny [the dealer] all cars, or any cars to which it was entitled, unless [the dealer] provided an exclusive facility, this would be evidence of coercion." [*Cabriolet*] at 1210...The distributor did not make a wrongful demand because it "did not threaten to take away, and did not take away, cars to which [the dealer] was entitled under the allocation system." *Id.*

Lussier, 393 F.3d at 44; Appendix at 27. But the Court of Appeals stopped short of this sentence in the very next paragraph of *Cabriolet*: "American Honda's suggestion did not present a 'condition[] [i.e. the exclusive facility] which benefited only, or primarily, the manufacturer,' as is typically the case in cases of 'coercion'...Both sides would be expected to profit if Cabriolet had gone exclusive." *Cabriolet* at 1210 (*quoting Volkswagen Interamericana, S. A. v. Rohlsen*) (citation omitted). *Cabriolet's* principles are those of *Rohlsen*, and even if the one-sided benefit test was mere *dicta* in *Rohlsen*, it became the holding of *Cabriolet*.

Here, dealers had no real choice but to purchase unwanted accessories to obtain access to the 31.5% of the cars SNE labeled as discretionary, turndown, and initial allocation, because their contracts required them to achieve in their area of responsibility sales performance that was reasonably comparable to the average sales performance of other dealers in their respective areas of responsibility. CA App. 1003. Dealers who did not meet this standard risked termination. Dealers could not simply forgo access to 31.5% of SNE's vehicles because under Fair Share II, allocation of automobiles

was based on the number of cars sold. 393 F.3d at 41; 286 F.Supp.2d at 90; Appendix at 22, 46.

The Court of Appeals also relied on *Colonial Dodge, Inc. v. Chrysler Corporation,* 11 F. Supp.2d 737 (D. Md. 1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997) which held that a manufacturer could require dealers to accept slower-selling automobiles as a precondition to receiving more popular models, without engaging in prohibited coercion under the ADDCA. The Court of Appeals neglected to note, however, that *Colonial*'s conclusion quoted *Cabriolet's* quote of *Rohlsen's* one-sided benefit analysis. *Colonial* recognized that the dealers benefited by receiving even slower selling cars from Chrysler, since Chrysler vehicles could be obtained nowhere else: "[*Cabriolet*] noted that 'Honda's suggestion did not present a "condition[] which benefited only, or primarily, the manufacturer," as is typically the case in cases of "coercion."'" *Colonial Dodge* at 737 (*quoting Cabriolet* at 1210, *quoting in turn Volkswagen Interamericana v. Rohlsen,* 360 F.2d at 442).

The difference between the one sided demand in this case and mutually beneficial conditions in *Cabriolet* and *Colonial* are demonstrated in the following chart:

	Requirement to Obtain More Cars	Benefit to Manufacturer	Benefit to Dealer	Harm to Dealer
Cabriolet	Expand Facility	Larger sales outlet to sell more cars	Larger sales outlet to sell more cars	None
Colonial	Purchase Slower-Selling Vehicles	Profit on sale of slower-moving vehicles	(1) Profit on slower-selling (but still profitable) vehicles which could be obtained only from Chrysler. (2) Profit from trade-in and warranty work.	None
Lussier	$1360 of accessories on initial allocation and special cars; $742 of accessories on discretionary; $493 of accessories on turndown; and $338 of accessories on "regular" cars to get access to discretionaries and turndowns	Profit of 30% to SNE on otherwise unsalable and undesirable accessories, compared to 3% profit on cars.	*No benefit to dealer. Accessories installed by SNE could be installed by dealer at customer request.*	*Accessories make the car harder to sell because consumers don't want them, and dealers cannot pass on all costs.*

CONCLUSION

The First Circuit Court of Appeal's rejection of its own "one-sided benefit analysis" that has been adopted by numerous Circuit and District Courts, and its decision that a dealer must demonstrate interference with a legally protected property right in order to state a claim under the ADDCA, is plainly incorrect. It is a radical change in settled law. It leads logically to the conclusion that the ADDCA provides no remedy not otherwise available for breach of contract. The analysis of what constitutes coercion, accepted by the Second and Eleventh Circuits and numerous lower courts – whether the benefit is entirely one sided – has stood the test of time. It is hardly extraordinarily favorable to dealers; it leaves ample room for business judgment. Congress has not seen fit to alter the *Rohlsen* test, which has been applied repeatedly by the federal courts, for 39 years.

Over thirty-seven states have enacted automobile dealer statutes which provide some counterbalance to the superior bargaining power of manufacturers by prohibiting specific practices. Virtually all of these statutes prohibit these practices to the extent that they constitute "coercion." The Court of Appeals noted that the standard of coercion under the state automobile franchise acts is generally considered to be the same as that under the ADDCA, and specifically so held with regard to the six New England statutes.

This Court's authoritative ruling on the definition of coercion will have a profound effect on the industry. The industry needs clear rules on what is prohibited and what is allowed. The First Circuit's decision is anomalous, unwise, and inconsistent with the clear legislative intent of Congress. The Court should restore certainty to the law by granting the Writ and reversing the decision of the First Circuit.

For the foregoing reasons, this Writ should be granted.

Respectfully submitted,

April 21, 2005

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United States Court of Appeals
For the First Circuit

No. 03-2715

GEORGE LUSSIER ENTERPRISES, INC. D/B/A LUSSIER SUBARU; SULLIVAN COUNTY MOTORS, INC. D/B/A SUBARU OF CLAREMONT; CAMILLERI BROS., INC. D/B/A C&C SUBARU; BALD HILL REALTY, INC. D/B/A BALD HILL SUBARU; KINNEY MOTORS, LTD.; REYNOLDS GARAGE & MARINE, INC.,

Plaintiffs, Appellants,

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH, JR.
AND
JOSEPH APPELBE,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Paul J. Barbadoro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Rosenn, [1] Senior Circuit Judge,
and Howard, Circuit Judge.

Richard B. McNamara, with whom Gregory A. Holmes, Stephanie A. Bray, Elizabeth M. Leonard and Wiggin & Nourie, P.A. were on brief, for appellants.

Donald R. Frederico, with whom Steven W. Kasten and McDermott, Will & Emery were on brief, for Ernest J. Boch and Subaru of New England, Inc.

Howard Cooper, with whom Nicholas Carter and Todd & Weld LLP were on brief, for Subaru of New England, Inc.

Ronald L. Snow, with whom Lisa S. Wade and Orr & Reno P.A. were on brief, for Joseph A. Appelbe.

Paul R. Norman, with whom Catherine L. Cetrangolo and Boardman, Suhr, Curry & Field LLP were on brief, for amicus curiae National Automobile Dealers Association.

December 16, 2004

TORRUELLA, Circuit Judge. Various New England Subaru dealers ("Dealers") appeal the summary judgment entered in favor of their distributor, Subaru of New England, Inc. ("SNE"), its sole shareholder and President, the late Ernest Boch, and its General Manager, Joseph Appelbe, in a class action commenced on March 5, 1999. Dealers assert that SNE controlled the vehicle allocation process to coerce them into purchasing unwanted accessories, and stated claims under the Federal Automobile Dealers' Day in Court Act ("ADDCA"), state dealer statutes, state contract law, the Sherman and Clayton Antitrust Acts, and the Racketeer Influenced Corrupt Organization Act ("RICO"). All claims were dismissed after discovery, and after careful review, we affirm.

I. Background

SNE is the exclusive New England distributor of Subaru products. Since 1971, it has contracted with Subaru of America, Inc. ("SOA") to purchase a designated number of vehicles and to use its best efforts to promote and sell Subaru vehicles and accessories through sales representatives. SNE does not have the contractual right to sell vehicles to the public; rather, its distributorship agreement limits its activities to promoting the sale of Subaru products through the solicitation of and contracting with dealers.

SNE's contract with Subaru dealers incorporates SOA's "Standard Provisions." It requires the "Dealer to order and purchase Cars, subject to availability, in adequate quantities and on a regular periodic basis in order for Dealer to achieve adequate sales performance." Although the agreement does not require SNE to sell all of the cars to its dealers, it requires SNE to "allocate all Subaru products equitably, using appropriate factors such as the respective inventory levels and sales performance of Distributor's dealers during a representative period of time immediately prior to such allocation."

A. <u>The Allocation System</u>

From February 1, 1987 until early 2001, SNE implemented the allocation provision under "Fair Share II."

Fair Share II established the number of regular allocation cars that each dealer was entitled to receive under fixed and variable components. The fixed component was based on the higher of a dealership's planned sales volume or its average actual sales three years prior to Fair Share II. The variable component was based on a dealer's rate of sales over time. Essentially, the more cars the dealers sold, the more cars they would earn in future allocations. Regular allocation vehicles comprised 88.5% of all vehicles sold to dealers during the class period.

Not every car that SNE buys from SOA, however, is distributed immediately to the dealers. SNE engages in the industry practice [(2)] of retaining a certain percentage of cars for

discretionary purposes. Fair Share II authorized SNE to withhold 10% of each vehicle shipment as "discretionary vehicles," which was later revised to 15% of Legacy models and 10% of all other models. Fair Share II further states that SNE will use these discretionary vehicles for demonstration, major auto shows, assistance to dealers, and VIPs. Discretionary vehicles comprised 11.5% of all vehicles sold to dealers during the class period.

Meanwhile, the regular allocation vehicles rejected by dealers are referred to as "turndown vehicles." Fair Share II did not specify how turndown vehicles should be reallocated; SNE sold them to other dealers in their districts. Any turndown vehicle that remained unsold at the end of the month became subject to the next monthly allocation.

Finally, initial allocation and "package models" vehicles comprised 1.5% of all cars distributed during the class period. Initial allocation vehicles are distributed in the first monthly allocation of each new model year and are preaccessorized for dealers to display in the showroom. Special package models are cars that SNE accessorized to create new models; they are sometimes built from the discretionary pool.

B. Conditioning and Concealment of Accessories

Dealers allege that during the class period -- from January 1995 to August 2001 -- SNE "hit upon a scheme to maximize its profits" by pre-installing accessories before vehicle distribution. SNE installed more than $53 million worth of accessories during the class period, resulting in an average charge of $427 per vehicle. To encourage such sales, SNE paid its district managers commissions on the sale of these accessories, which amounted to between 40% to 60% of the managers' total compensation. SNE did not pay these commissions unless the district managers' average gross profit on such sales met a prescribed target of $140, requiring about $475 in accessory sales per vehicle. SNE further encouraged the sale of

overstocked accessories by providing district managers with "focus letters" identifying such accessories.

Dealers assert that SNE conditioned access to discretionary and turndown cars by coercing dealers to purchase accessories in regular allocation cars. As evidence, dealers present an expert analysis establishing "a strong and statistically significant relationship between the volume of accessories purchased by Dealers and the number of discretionary and turndown cars they subsequently purchased." Dealers also present anecdotal evidence from dealers and former SNE employees alleging that SNE (1) conditioned access to discretionary and turndown cars on a dealer's assent to purchase accessories for regular allocations cars, and (2) used techniques such as tampering with the computer-based allocations, altering the color and model mix of cars assigned to particular dealers, and refusing to fill "sold orders" from dealers who did not purchase enough accessories.

Dealers also assert that SNE fraudulently concealed its conditioning practice. As evidence, dealers offer letters sent by Appelbe and another SNE employee stating that "accessories are strictly optional! You do not have to purchase any accessories on any Subaru you purchase from SNE." Moreover, SNE told dealers at an advisory meeting on October 23, 1996 that "no vehicles will be pre-accessorized in the future with the exception of Safari and Rally [models]." An SNE representative also stated in a letter to a dealer that "you are always entitled to purchase vehicles with or without port installed accessories."

Dealers filed suit under the ADDCA, state dealer acts, RICO, the Sherman and Clayton antitrust acts, and state contract law, arguing that SNE coerced them into purchasing unwanted accessories and fraudulently concealed this practice. Both dealers and SNE submitted dueling summary judgment motions. On September 26, 2003, the district court denied dealers' summary judgment motion and granted SNE's summary judgment motion on the ADDCA, state dealer statutes, antitrust acts, RICO, and state contract law claims. [3] Specifically, the

court held, inter alia, that "SNE's conditioning practices do not violate the ADDCA or the state dealer acts and will not support a RICO extortion claim because they are not coercive; they do not violate the antitrust laws because SNE lacks market power in the relevant tying product market; and they do not breach SNE's dealer agreements because they are not unlawful, unethical, or inequitable." George Lussier, 286 F. Supp. 2d at 93. Dealers appeal the ADDCA, state dealer law, state contract law, and RICO [4] claims.

We now review each issue de novo, see, e.g., Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 60 (1st Cir. 2004) (summary judgment motions reviewed de novo), "reviewing the entire record in the light most hospitable to the party opposing summary judgment" -- the Dealers. Euromotion, Inc. v. BMW of North America, Inc., 136 F.3d 866, 869 (1st Cir. 1998)(citations omitted).

II. Analysis

A. The ADDCA

The ADDCA provides automobile dealers with a federal cause of action against automobile manufacturers who fail "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer . . . ." 15 U.S.C. § 1222 (1998)(emphasis added). The Act defines "good faith" as

> the duty . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. § 1221(e).

In interpreting ADDCA's good faith provision, "[t]his court has read the requirements of the ADDCA very narrowly to require 'actual or threatened coercion or intimidation.'" General GMC, Inc. v. Volvo White Truck Corp., et al., 918 F.2d 306, 308 (1st Cir. 1990)(quoting H.D. Corp. of Puerto Rico v. Ford Motor Co., 791 F.2d 987, 990 (1st Cir. 1986))(emphasis added). Lack of "good faith" does not simply mean malicious conduct or unfairness; "it must be found in the context of actual or threatened coercion or intimidation." H.D. Corp., 791 F.2d at 990. Coercion "must be actual; the mere fact that a dealer may have felt it had been coerced or intimidated is not sufficient." Id. For example, a manufacturer "condition[ing] continuation of a franchise upon certain conduct, even if characterizable as a threat, cannot constitute forbidden coercion per se. It must appear that the condition was unfair or inequitable." Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 442 (1st Cir. 1966).

This Court has held, and we again emphasize, that "coercion or intimidation [under the ADDCA] must include a wrongful demand that would result in penalties or sanctions if not complied with." Wallace Motor Sales, Inc. v. Am. Motors Sales Corp., 780 F.2d 1049, 1059 (1st Cir. 1985)(agreeing with several other circuits that "coercion or intimidation must include a wrongful demand which will result in sanctions if met."). That is, to state a cause of action under the ADDCA, the aggrieved dealer must produce evidence that the manufacturer or distributor [5] (1) made a wrongful demand, coupled with (2) sanctions, or threat thereof. Id. at 1056. Otherwise, summary judgment is warranted if the dealer "has produced no evidence showing that it was subjected to coercion or intimidation" by the manufacturer or distributor. General GMC, 918 F.2d at 308.

In the instant case, appellants argue that SNE's pre-accessorization practice amounts to coercion and thus violates ADDCA's good-faith requirement because it solely benefits SNE at the expense of dealers. Appellants present three key pieces of evidence to show coercion: (1) expert testimony establishing a "strong and statistically significant relationship

between the volume of accessories purchased by Dealers and the number of discretionary and turndown cars they subsequently purchased"; (2) anecdotal evidence from dealers and former SNE employees alleging that SNE conditioned access to turndown and discretionary cars based on dealers' assent to purchase accessories for regular allocation cars; and (3) data indicating the disparity in price of average accessories between turndown, discretionary, and initial and special model vehicles ($490, $742, $1,360, respectively) versus regular allocation vehicles ($338). This proffered evidence ostensibly demonstrates that SNE "coerced" appellant dealers to buy accessories in regular allocation cars to gain access to discretionary and turndown cars, and that SNE installed leftover and "unwanted" accessories in turndown and discretionary cars. SNE's "coercive" practice, appellants argue, confers sole benefit to SNE to the sole detriment of the dealers, who allegedly are unable to pass the cost increases to consumers and must wait longer to sell these highly accessorized cars.

Viewing the evidence in the light most favorable to appellants, we find that SNE's conduct does not amount to coercion within the meaning of ADDCA. We simply fail to see how SNE's practice of conditioning access to, or accessorizing, discretionary and turndown cars -- cars which dealers concede they had no contractual right to receive -- constitutes coercion.

Several courts have found no coercion for various conditions imposed by distributors for dealers' access to vehicles which they were not entitled to receive. In Cabriolet Porsche Audi, Inc. v. Am. Honda Motor Co., Inc., 773 F.2d 1193, 1209-11 (11th Cir. 1985), for example, the Eleventh Circuit held that a distributor's offer of extra cars beyond the regular allocation process, in return for establishing an exclusive facility, does not amount to coercion in violation of ADDCA. 773 F.2d at 1209-11. The court stated that "[w]e have little doubt that had [the distributor] threatened to deny [the dealer] all cars, or any cars to which it was entitled, unless [the dealer] provided an exclusive facility, this would be evidence of coercion." Id. at 1210 (emphasis added). The distributor did not make a

wrongful demand because it "did not threaten to take away, and did not take away, cars to which [the dealer] was entitled under the allocation system." Id. A manufacturer's or distributor's suggestions of ways to obtain extra cars -- more cars than a dealer is entitled to receive under the regular allocation system -- does not amount to coercion in violation of ADDCA. Id.

Similarly, in Colonial Dodge, Inc. v. Chrysler Corp., 11 F. Supp. 2d 737, 744-46 (D. Md. 1996), aff'd, 121 F.3d 697 (4th Cir. 1997), a district court granted summary judgment for the manufacturer because its requirement that dealers accept hard-to-sell automobiles as a precondition to receiving excess, fast-selling automobiles did not amount to coercion under the ADDCA. As evidence, the dealers offered affidavits indicating that the manufacturer refused to supply high-end vehicles beyond what was allocated under the "turn and earn" method unless the dealers agreed to order additional low-demand models. Id. at 746. The court held that since dealers offered no evidence that the manufacturer was required under any existing agreement to provide these extra vehicles, or that the manufacturer threatened to cut back on their supply of other vehicles if dealers did not order additional vehicles beyond the "turn and earn" system, dealers "cannot demonstrate coercion within the meaning of the statute." Id. Thus, the court granted summary judgment for the manufacturer because dealers failed to establish any genuine dispute of material fact under the ADDCA. Id.

We find these cases persuasive, and thus hold that a manufacturer's conditioning of access to vehicles beyond the regular allocation process, without more, does not amount to a "wrongful demand" that would constitute coercion under ADDCA's good-faith requirement. Since dealers are not contractually entitled to these extra vehicles, a manufacturer's decision to impose reasonable conditions for dealer access is neither "wrongful" nor even a "demand." These conditions are not wrongful because they are part of a bargained-for exchange (e.g., accessories for extra cars, taking less-desirable cars to access discretionary highly desirable cars); neither do these

conditions constitute a "demand" because dealers need not take these extra cars. Rather, these conditions constitute reasonable business judgments in a free market economy, and "[a] distributor acting honestly is entitled to latitude in making commercial judgments." Coady Corp. v. Toyota Motor Distrib., Inc., 361 F.3d 50, 56 (1st Cir. 2004). Summary judgment is therefore proper if a plaintiff dealer fails to offer evidence showing a wrongful demand and sanctions, and thus coercion, under the ADDCA's good-faith requirement.

Here, since dealers concede that they had no contractual right to receive either turndown or discretionary vehicles, [(6)] this ends our inquiry. Dealers' proffered evidence, even if taken to be true, merely establishes that (1) SNE conditioned access to turndown and discretionary cars based on dealers' assent to purchase accessories for regular allocation cars, and (2) SNE installed unwanted leftover accessories on the turndown and discretionary cars. However, since dealers offer no evidence indicating that SNE made wrongful demands to access vehicles that dealers were contractually entitled to receive, the district court properly granted summary judgment for SNE.

Appellants nonetheless urge us to follow language from our decision in Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 442 (1st Cir. 1966) to define "good faith" under ADDCA. In Rohlsen, we held that the distributor's termination of a dealer's franchise related to the conduct of a dealer's agency, or the dealer's rejection of the distributor as partner on unreasonable terms, was a jury question. Id. at 444. Rohlsen states, in relevant part, that "we think there is an important difference between two kinds of improper conditions that a manufacturer might impose and back up by threats." Id. at 442. "Particularly suspect under the act are conditions which benefit only, or primarily, the manufacturer . . . as distinguished from requirements that would tend to work to the mutual advantage of both parties." Id. Appellants allege that under this test, SNE's pre-accessorization practice only benefits SNE, and thus violates SNE's good-faith requirement.

We reject appellants' reading on two grounds. First, appellants' proffered "test" is mere dicta; we merely explored two possible scenarios for a condition to constitute coercion under ADDCA's good-faith requirement. We never announced a test for coercion, and thus good faith, in Rohlsen. See Wallace, 780 F.2d at 1056 ("This is the first time the meaning of this provision ['good faith' in 15 U.S.C. § 1221(e)] has come up for review in this circuit."). Rather, we have now clarified that good faith under ADDCA requires a showing of (1) wrongful conduct coupled with (2) sanctions, or threat thereof. See also id. at 1059. And as we have explained, appellants fail to state a claim under this test. Second, even under the alleged "Rohlsen test," appellants fail to show that SNE's pre-accessorization practice lacks mutual benefit. Appellant dealers gained the additional benefit of cars that they were not otherwise entitled to receive and the additional profits that could be gained therefrom.

Finally, although we agree with appellants and amicus that the district court erred in instituting a "'brand new' viability test," summary judgment is nonetheless warranted under the coercion test. Contrary to the district court's analysis, plaintiff dealers need not offer evidence that the contested "practices threatened any dealer's ability to conduct successful business operations" to state a claim under ADDCA. Such requirement is too narrow. It is enough that dealers offer evidence that the manufacturer or distributor made a wrongful demand coupled with threats of sanctions, such as withholding vehicles that dealers are legally entitled to receive. The district court's error, however, does not change the propriety of summary judgment in the instant case. See, e.g., Torres v. E.I. Dupont De Nemours & Co., 219 F.3d 13, 17 (1st Cir. 2000)(citations omitted) ("We may . . . uphold the district court's order granting summary judgment regardless of whether we reject or adopt its rationale, so long as an 'independently sufficient ground' is made manifest by the record.").

Thus, we affirm the district court's judgment on the ADDCA claim.

B. State Dealer Acts

In addition to the ADDCA claim, appellants allege that the state statutory counterparts to the ADDCA prohibit SNE's conduct. Appellants argue that contrary to the district court's holding, these state dealer statutes define coercion more broadly than the ADDCA and, consequently, cover the type of conduct engaged in by SNE. We disagree.

Each of the six states where SNE operates have enacted statutory counterparts to the ADCCA. Massachusetts [(7)] makes it unlawful to "coerce," Rhode Island, [(8)] Maine, [(9)] and New Hampshire [(10)] make it unlawful to "coerce or attempt to coerce," Vermont [(11)] makes it unlawful to "require or coerce," and Connecticut [(12)] makes it unlawful to "require," dealers to buy, order, or accept accessories that they have not voluntarily ordered. Of these, only the New Hampshire statute defines "coercion," which adopts language analogous to the ADDCA. [(13)]

Appellants argue that the state dealer statutes' prohibitions against coercing dealers into purchasing unordered accessories extend beyond "coercion" as understood under the ADDCA. Appellants cite a First Circuit decision where we stated that in construing the Massachusetts dealer act, "[b]ad faith may encompass broader conduct under Chapter 93B than mere coercion or intimidation." General GMC, 918 F.2d at 309 (citing Tober Motors, Inc. v. Reiter Oldsmobile, Inc., 376 Mass. 313, 319-20, 381 N.E.2d 908 (1978)). This precedent, along with the statutes' legislative history, ostensibly demonstrate a legislative intent to eliminate the dealer's burden of showing wrongful conduct and threat of sanctions to state a claim under the state dealer acts.

Although more compelling than the ADDCA claim, we find appellants' argument unpersuasive. First, appellants' reliance on General GMC is misplaced. In General GMC, we held that although summary judgment was proper as to the ADDCA claim because the dealer produced no evidence of coercion,

summary judgment was improper as to the state dealer claim because genuine issues of material fact existed as to whether the manufacturer acted in bad faith in terminating the dealer's franchise. 918 F.2d at 308-09. We reasoned that because Chapter 93B -- the Massachusetts counterpart to the ADDCA -- does not define "bad faith" or "good cause," a court is not bound by the same restrictions that exist under ADDCA: "[b]ad faith may encompass broader conduct than mere coercion or intimidation." Id. at 308. Our holding, however, interpreted Section 4(1) of 93B, which prohibits manufacturers from acting in "bad faith," and Section 4(3)(e), which prohibits manufacturers from cancelling or terminating a franchise "without good cause." The issue here pertains to a different section -- Section 4(2) -- which prohibits "coercion," specifically, the manufacturer's coercion of dealers into purchasing accessories. Therefore, we do not read General GMC to mean that "coercion" under the state dealer statutes automatically encompasses conduct beyond its meaning under ADDCA.

To the contrary, courts have consistently held that "coercion" under state dealer statutes holds the same meaning as under the ADDCA. See, e.g., Hubbard Chevrolet Co. v. Gen. Motors Corp., 873 F.2d 873, 876 (5th Cir. 1989)(declining to read a broader definition of "coercion" under Mississippi dealer's act because there is "no evidence indicating that the Mississippi statute's further definition of 'coerce' represents an effort to broaden the scope of 'good faith.'"); Gage v. Gen. Motors Corp., 796 F.2d 345, 350-51 (10th Cir. 1986)(assuming that federal case law interpreting "coercion" under the ADDCA also governed the similar language in the Colorado statute); Subaru Distrib. Corp. v. Subaru of Am., 47 F. Supp. 2d 451, 465, n.9 (S.D.N.Y. 1999)(noting that "coercion" has been interpreted to have the same meaning under both the New York Dealer Act and the ADDCA); Colonial Dodge, 11 F. Supp. 2d at 744 (holding that "[w]hile there are slight differences between the state and federal statutes, 'coercion' under both the State Act and the ADDCA embodies the same concept, and accordingly the same analysis applies.").

We find these cases instructive, and agree with the district court that "coercion" holds the same meaning under both the state dealer acts and the ADDCA. [14] The Rhode Island Supreme Court has already defined its own state dealer statute as such: "we define coercion as 'a wrongful demand which will result in sanctions if not complied with.'" Dunne Leases Cars & Trucks, Inc. v. Kenworth Truck Co., 466 A.2d 1153, 1160 (R.I. 1983)(quoting Marquis v. Chrysler Corp., 577 F.2d 624, 633 (9th Cir. 1978) (quoting Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 685 (6th Cir. 1976)). As for Massachusetts, Maine, and Vermont, [15] the fact that their state legislatures have not defined "coercion" suggest that they did not intend to give the word a different meaning than it has in the ADDCA. While we are not bound by the same restrictions under ADDCA because the state legislatures did not define "coercion," cf. General GMC, 918 F.2d at 309 (reasoning that because the state counterpart to the ADDCA does not define "bad faith" or "good cause," a court is not bound by the same restrictions as under the ADDCA in determining "bad faith"), we see no reason to depart from its federal meaning in this case. As for New Hampshire, the fact that its definition of "coercion" mirrors the ADDCA language suggests that it holds the same meaning of wrongful conduct and threat of sanctions as the ADDCA.

Finally, the fact that Connecticut does not mention "coercion," but merely makes it unlawful to "require" dealers to purchase unordered accessories, does not warrant reversal on the state dealer statute issue. We simply fail to see how SNE is "requiring" dealers to purchase accessories in the discretionary and turndown cars when dealers need not purchase these cars in the first place; individual dealers have no contractual obligation to receive or purchase any cars beyond the regular allocation process. Since dealers are not "required" to purchase these accessories, no genuine issue of material fact exists under the Connecticut statute.

For the foregoing reasons, we affirm the district court's summary judgment on the state dealer statute claims.

C. State Contract Claims

Appellants also allege that SNE breached its contractual obligation to allocate cars "fairly and equitably" by concealing the true terms for allocating discretionary and turndown cars: the purchase of accessories. We are not convinced.

SNE's franchise agreement with each dealer obligates SNE to "perform[ ] its obligations under the Agreement in a lawful and ethical manner," including "allocat[ing] all affected Subaru products equitably, using appropriate factors." Fair Share II similarly expressed SNE's desire to allocate vehicles "in a manner that, in SNE's opinion, will maximize the business opportunity for both SNE and its dealers consistent with SNE's desire to allocate vehicles fairly and equitably." (emphasis added). Fair Share II is silent on turndown vehicles, but describes discretionary cars as "[v]ehicles to be used as demonstrators by [SNE]; vehicles used for major auto shows; vehicles set aside to assist dealers who, at the sole discretion of [SNE], need assistance and vehicles delivered to VIPs." (emphasis in original). Fair Share II also refers to discretionary cars as potentially used for "market action," an undefined term.

Appellants argue that SNE breached these contractual obligations and deceived dealers (1) by not stating that it intended to sell discretionary cars only with accessories, (2) by not stating anything about turndown cars, and (3) by using discretionary cars to encourage the purchase of accessories in regular allocation cars. Viewing the evidence in the light most favorable to appellants, and reviewing the district court's holding de novo, [(16)] we nonetheless find that SNE did not breach its contract with the dealers.

First, we reject appellants' argument that SNE breached its contractual obligation to distribute all Subaru products "fairly and equitably" by failing to state its intent to sell discretionary cars only with accessories. "Every system has pluses and

minuses, and a fair allocation system does not mean one without wrinkles." Coady, 361 F.3d at 58. For example, we recently noted that a distributor's failure to have a "written policy" on a particular method of allocation is "not itself arbitrary or unfair," especially when the "allocation system depends, to some extent, upon each district manager's discretion in offering vehicles to dealers." Id. at 58. We have also upheld a district court finding that a manufacturer did not breach its contract to distribute cars "fair[ly] and equitab[ly]" during a time of increased shortage, as long as the dealer received all that it was entitled to receive under the contract. Narragansett Motors, Inc. v. Packard Motor Car Co., 193 F.2d 545, 546 (1st Cir. 1951).

Here, although we would have preferred that SNE explicitly stated its conditioning practice in the contracts, we nonetheless conclude that SNE did not breach its contractual obligation to distribute all Subaru products "fairly and equitably." SNE's failure to state its conditioning practice in the contracts, standing alone, is insufficient to find a breach of its contractual duty of fair and equitable allocation. See Coady, 361 F.3d at 58. Discretionary vehicles, by their very nature in the contracts, [17] are distributed at the "discretion" of SNE, subject only to a "fair and equitable" allocation. The fact that dealers have received all that they were entitled to receive under the contract -- through regular allocation vehicles comprising 88% of all cars distributed during the class period -- supports a finding of "fair and equitable" allocation. See Narragansett Motors, 193 F.2d at 546. Moreover, the fact that all dealers had to purchase accessorized discretionary cars if they wanted access to such cars supports a finding of "equitable" allocation. Thus, along with the fact that neither the Dealership Agreements nor Fair Share II forbids SNE's accessorization of discretionary cars, we find that SNE did not breach its contract to "fairly and equitably" distribute discretionary cars.

Under the same analysis, we likewise reject appellant's argument regarding turndown cars. SNE's failure to have a written policy on turndown cars, without more, does not render its allocation system unfair or inequitable. See Coady, 361 F.3d

at 58. Since dealers received all that they were entitled to receive under the regular allocation process, and since turndown cars have already passed through this agreed-upon regular allocation process, we do not find that SNE breached its contract. See Narragansett Motors, 193 F.2d at 546.

Finally, we reject appellants' argument that SNE breached it contracts by using discretionary cars to encourage the purchase of accessories in regular allocation cars. We defer to the district court's factual finding that "more than 88% of all vehicles were initially allocated under Fair Share II using a formula that did not take into account whether a dealer had agreed to purchase accessories." George Lussier, 286 F. Supp. 2d at 101.

Therefore, since appellants "provide[s] no reason to suppose that allocation system claims that have failed under the statute should prevail under the contract, . . . no more need be said about this contract-claim perspective." Coady, 361 F.3d at 59. We uphold the district court's grant of summary judgment on these claims.

D. RICO Claims

Appellants further allege claims under RICO,[18] arguing that "[t]he same conduct that constituted a wrongful demand and threatened sanction, and which violated these pre-existing rights guaranteed by State [dealer] and Federal [ADDCA] statutes, is extortion under the Hobbs Act." This argument also fails.

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951 (2000)(emphasis added). Although "fear" may include economic fear, see United States v. Hathaway, 534 F.2d 386, 395-96 (1st Cir. 1976), "there is nothing inherently wrongful about the use of economic fear to obtain property," United States v. Sturm, 870 F.2d 769, 773 (1st Cir. 1989). Indeed, "the fear of economic loss is a driving force of our economy that plays an important role in many legitimate

business transactions." Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523 (1st Cir. 1998). Rather, economic fear is wrongful under the Hobbs Act if the plaintiff had a pre-existing statutory right to be free from the defendant's demand. See id. at 525-26 (holding that plaintiff failed to state an extortionate predicate act because plaintiff had no pre-existing right to be an approved provider, and thus free of economic fear); Viacom Int'l Inc. v. Icahn, 747 F. Supp. 205, 213 (S.D.N.Y. 1990), aff'd on other grounds, 946 F.2d 998 (2d Cir. 1991)(distinguishing between "hard bargaining" and extortion based on the plaintiff's "pre-existing entitlement to pursue his business interests free of the [economic] fear he is quelling").

Here, appellants argue that since SNE's conditioning practice constitutes coercion under the state dealer statutes and the ADDCA, the practice also constitutes extortion under the Hobbs Act. We have now clarified, however, that such practice does not violate the ADDCA or state dealer statutes because conditioning access to cars beyond the dealer's rightful entitlement does not amount to a "wrongful demand" to constitute a component for coercion. Thus, assuming arguendo that we have adopted appellants' rationale, since SNE's conditioning practice is not coercive under the ADDCA, neither is it extortionate under the Hobbs Act. SNE's conditioning of access to cars to which dealers had no pre-existing entitlement [(19)] represents lawful hard-bargaining, not unlawful extortion.

Appellants further allege that SNE engaged in mail and wire fraud under RICO. Specifically, SNE allegedly (1) withheld computer-allocated cars from a dealer's folder and then told the dealers that they were hand-allocated cars which could only be obtained with accessories, (2) shuffled load sheets from one dealer folder to another to ensure that dealers who bought more accessories received more desirable cars, and (3) repeated false assurances such as "accessories are strictly optional" whenever the dealers became restless or threatened a lawsuit. Dealers argue that since these false statements were made through mails and wires and were sufficiently numerous to comprise a RICO

"pattern," they have stated a civil RICO claim. Since dealers fail to establish causation, however, this claim also fails.

To have standing in a civil RICO claim, plaintiffs must show "some direct relation between the injury asserted and the injurious conduct alleged." Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268 (1992). Plaintiffs may not succeed by merely proving that the predicate acts were a "cause in fact" of the plaintiffs' injuries; rather, Section 1964(c) requires that the defendant's specified acts of racketeering were the proximate cause of the plaintiffs' injuries. Id. at 268; Camelio v. Am. Fed'n, 137 F.3d 666, 669-70 (1st Cir. 1998)(dismissing plaintiff's RICO claim and explaining proximate causation requirements under 18 U.S.C. § 1964(c)). Otherwise, plaintiffs may not recover in a civil RICO claim if their injuries are so far removed from the defendant's acts that they are indirect and derivative. Holmes, 503 U.S. at 268-69 (holding that plaintiff did not have standing because his injuries were indirect as his losses were purely contingent on the insolvency of third parties).

Here, dealers fail to establish a "direct relation between the injury asserted and the injurious conduct alleged." See id., 503 U.S. at 268. The "injurious conduct alleged" involves the fraudulent concealment of SNE's option-packing scheme. The "injury asserted" involves costs associated with the (1) purchase of unwanted accessories, (2) payment of floor plan interest for accessorized vehicles that took longer to sell, and (3) reductions in the value of their dealerships. The injury asserted, however, was directly caused by the option-packing scheme, rather than the fraudulent scheme of concealment. Dealers fail to offer any evidence that the alleged fraud directly caused specific injuries, such as a dealer signing a dealer contract or making substantial investment in a dealership as a result of the fraud. Although SNE's alleged fraudulent conduct may have contributed to dealers' specific injuries -- i.e., buying unwanted accessories, paying floor plan interests, reducing the value of their dealerships -- such indirect and derivative injuries are

insufficient to have standing in a civil RICO claim. See Holmes, 503 U.S. at 268-69.

For the foregoing reasons, appellants' civil RICO claims fail as well. [(20)] Finally, since the only claim against the late Ernest Boch individually is the failed civil RICO claim, we need not decide appellants' last issue of whether the district court erred in denying their motion to substitute defendants.

In closing, we note that SNE "ought to reflect that it has enjoyed a measure of good fortune in escaping unscathed in this lawsuit." Cf. Coady, 361 F.3d at 62. Its allocation and concealment practices were no model of perfection; individual dealers could plausibly pursue claims that SNE used other coercive means to induce dealers to purchase accessories. See George Lussier, 286 F. Supp. 2d at 93. Nonetheless, with regard to the class action claims and issues on this appeal, the judgment is

Affirmed.

1. Of the Third Circuit, sitting by designation.

2. The Massachusetts legislature, for example, recently endorsed this practice by amending its state dealer statute to allow manufacturers and distributors to withhold up to fifteen percent of cars and distribute them "for any business purpose that the manufacturer or distributor considers appropriate." Mass. Gen. Laws ch. 93B, § 4(c)(1)(i-ii)(2002). See also Coady Corp. v. Toyota Motor Distrib., Inc., 361 F.3d 50, 56 (1st Cir. 2004)(10% of cars and 15% of trucks retained from regular allocation); Cabriolet Porsche Audi, Inc. v. Am. Honda Motor Co., Inc., 773 F.2d 1193 (11th Cir. 1985)(15% of cars retained in discretionary pool); Colonial Dodge, Inc. v. Chrysler Corp., 11 F. Supp. 2d 737 (D. Md. 1996)(10% of cars retained in discretionary pool).

3. The court, however, denied without prejudice SNE's summary judgment motion on dealer's claim that SNE used

other coercive means to induce dealers to purchase accessories. The court reasoned that these claims are subsidiary to the conditioning claim, and "may not warrant class action treatment because common questions do not predominate and a class action would not be superior to other forms of adjudication." George Lussier Enters., Inc. v. Subaru of New England, Inc., 286 F. Supp. 2d 86, 93 (D.N.H. 2003).

4. The RICO claim includes coercion, mail and wire fraud, and substitution of defendants.

5. "It is entirely consistent with both the purpose and language of the act to hold that 'automobile manufacturer' means, inter alia, 'automobile distributor,' when the distributor is subject to the manufacturer's control." Rohlsen, 360 F.2d at 441.

6. In response to SNE's Motion to Dismiss, dealers state that they "do not allege or in any way presume that they are contractually entitled to a certain percentage of discretionary cars."

7. The Massachusetts state dealer act makes it unlawful for a manufacturer or distributor to "coerce" a dealer to "accept or buy any . . . accessory . . . which has not been ordered or requested by the motor vehicle dealer." Mass. Gen. Laws Ann. ch. 93B, § 4(2) (b) (1997 & Supp. 2003).

8. The Rhode Island state dealer act makes it unlawful for a manufacturer to "coerce, or attempt to coerce," a dealer "to order or accept . . . accessories . . . which the motor vehicle dealer has not voluntarily ordered." R.I. Gen. Laws § 31-5.1-4(b) (2002).

9. The Maine state dealer statute makes it unlawful for a manufacturer or distributor to "coerce or attempt to coerce" a dealer to "order or accept delivery of . . . accessories . . . which such motor vehicle dealer has not voluntarily ordered." Me. Rev. Stat. Ann. tit. 10, § 1174(2) (1997 & Supp. 2002).

10. The New Hampshire state dealer statute makes it unlawful for a manufacturer "to coerce or attempt to coerce" a dealer to "[o]rder or accept delivery of . . . accessories . . . which such motor vehicle dealer has not voluntarily ordered." N.H. Rev. Stat. Ann. § 357-C:3 (1995 & Supp. 2002).

11. The Vermont state dealer statute makes it unlawful for a manufacturer to "require or to coerce" a dealer to "order or accept delivery of any . . . accessory . . . which shall not have been voluntarily ordered" by the dealer. Vt. Stat. Ann. tit. 9, § 4096 (2002).

12. The Connecticut state dealer statute makes it unlawful for a manufacturer or distributor to "require" a dealer to "[o]rder or accept delivery of any . . . accessory . . . not . . . voluntarily ordered by the dealer." Conn. Gen. Stat. Ann. § 42-133bb (2003).

13. New Hampshire defines "coerc[ion]" as the "the failure to act in a fair and equitable manner in performing or complying with any terms or provisions of a franchise or agreement; provided, however, that recommendation, persuasion, urging or argument shall not be synonymous with 'coerce' or lack of 'good faith'." N.H. Rev. Stat. Ann. § 357-C:3 (1995 & Supp. 2002).

14. Moreover, the argument that "coercion" holds different meanings under different state dealer statutes negates the presence of "common questions of law" necessary for class certification. See Fed. R. Civ. P. 25(a).

15. Vermont makes it unlawful to "require or to coerce" dealers into purchasing unordered accessories. Vt. Stat. Ann. tit. 9, § 4096. For analysis of the "require" component, see next paragraph.

16. "Contract interpretation is often said to be 'a question of law' for the trial judge and, accordingly, subject to de novo review by the appellate court." Principal Mut. Life Ins. Co. v. Racal-Datacom, Inc., 233 F.3d 1, 3 (1st Cir. 2000) (citing Commercial

Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386, 388 (1st Cir. 1993)). For "disputes of fact relating to the construction of contract terms," however, "those findings are subject to deference on review." Id. (citing United States Liab. Ins. Co. v. Selman, 70 F.3d 684, 687 (1st Cir. 1995)).

17. Fair Share II specifies that discretionary vehicles will be set aside, inter alia, "to assist dealers who, at the sole discretion of Subaru of New England, need assistance." (Emphasis added).

18. RICO, 18 U.S.C. §§ 1961-1968 (2000), primarily designed as a criminal statute, see Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985), also provides civil remedies -- including treble damages and attorney's fees -- to persons injured in their business or property by a prohibited act. 18 U.S.C § 1964(c).

19. We also reject dealers' argument, raised for the first time in this appeal, that they had a "collective" right to receive all of the vehicles delivered by SOA to SNE for distribution through that system. Not only is this issue waived since dealers did not make this argument in the district court, see Sammartano v. Palmas del Mar Prop., Inc., 161 F.3d 96, 97 (1st Cir. 1998), but each dealer had a separate contract with SNE and thus had no "collective" entitlement.

20. Since appellants lack standing to state a civil RICO claim, this ends our inquiry. Nevertheless, we note that appellants' civil RICO claim would also fail as a matter of law because they could not establish that SNE used an "enterprise" as a vehicle for racketeering, thus corrupting an otherwise lawful enterprise. See Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 259 (1994); United States v. Turkette, 452 U.S. 576, 583 (1981). Appellants allege that the New England Subaru Dealer Network, which presents dealer concerns to SNE through its Advisory Board, constitutes a RICO "enterprise." Far from a prototypical RICO enterprise, however, there is no evidence that SNE "was able to commit the predicate [racketeering] acts by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of its association with the enterprise" --

the Dealer Network. United States v. Marino, 277 F.3d 11, 27 (1st Cir. 2002). See also Fitzgerald v. Chrysler Corp., 116 F.3d 225, 227-28 (7th Cir. 1997)(describing a prototypical RICO case as one where the "defendant gains additional power to do evil by taking over a seemingly legitimate enterprise"). Since SNE did not gain additional power to "racketeer" and engage in mail and wire fraud by "taking over" the Dealer Network, appellants' RICO claim fail as a matter of law.

George Lussier Enterprises, Inc. d/b/a Lussier Subaru, et al.
v. Subaru of New England, Inc., et al.

Civil No. 99-109-B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

2003 DNH 160; 286 F. Supp. 2d 86; 2003 U.S. Dist. LEXIS 17152; 2003-2 Trade Cas. (CCH) P74,180

September 26, 2003, Decided

MEMORANDUM AND ORDER

A number of current and former New England Subaru dealers have brought this class action against their distributor, Subaru of New England, Inc. ("SNE"), its sole shareholder and President, Ernest Boch, and its Executive Vice President and General Manager, Joseph Appelbe. The dealers assert that SNE misused its power to control the vehicle allocation process to coerce them to purchase unwanted accessories. They also charge that defendants employed other coercive means to induce them to purchase accessories and fraudulently concealed SNE's "option-packing" scheme. They claim that defendants violated the Automobile Dealer Day in Court Act ("ADDCA"), various state dealer statutes, the Racketeer Influenced Corrupt Organization Act ("RICO"), the Sherman and Clayton antitrust acts, and SNE's dealer contracts. The parties have submitted dueling motions for summary judgment. [1]

I. BACKGROUND

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[1] In ruling on these motions, I construe the evidence in the light most favorable to the nonmoving parties and enter summary judgment only if the undisputed material facts demonstrate that they are entitled to judgment as a matter of law. See Navarro v. Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2001).

Subaru automobiles are manufactured by Fuji Heavy Industries, Ltd., and distributed in the United States by Subaru of America, Inc. ("SOA"). Since 1971, SOA has contracted with SNE to serve as its distributor in the New England region. SNE's distribution agreement requires it to purchase a designated number of vehicles from SOA and specifies that SOA may terminate the agreement in certain circumstances if SNE fails to meet its quota. The agreement also obligates SNE to use its best efforts to promote and sell Subaru vehicles and accessories through the use of sales representatives.

SNE has entered into dealership agreements with each Subaru dealership in New England. The dealership agreements incorporate SOA's "Standard Provisions," a document that outlines the general terms and conditions that apply to each dealership. The provisions provide that "it will be necessary for Dealer to order and purchase Cars, subject to availability, in adequate quantities and on a regular periodic basis in order for Dealer to achieve adequate sales performance." Appendix to Defs.' Mot. for Summ. J. (Defs.' App.) at Tab 57, Burbank Aff., Ex. G, P11.1. They also state, however, that "Subaru Products may not be available to Dealer in sufficient supply from time to time because of production limitations or other factors." Id. at P11.3 In an effort to assure dealers that SNE will allocate vehicles fairly, the provisions require SNE to "allocate all affected Subaru Products equitably, using appropriate factors such as the respective inventory levels and sales performance of Distributor's dealers during a representative period of time immediately prior to such allocation." Id. SNE also "has the sole responsibility of performing its obligations . . . in a lawful and ethical manner." Id. at P2.2.

A. Fair Share II

From February 1, 1987 until early 2001, SNE used the "Fair Share II Distribution System" to allocate vehicles. Fair

Share II's stated purpose was to allocate vehicles "in a manner, that, in SNE's opinion, will maximize the business opportunity for both SNE and its dealers consistent with SNE's desire to allocate vehicles fairly and equitably." See Defs.' App. at Tab 60, Eddy Aff., Ex. A. Fair Share II used a formula based largely on past sales performance to allocate most vehicles.

1. The Allocation Formula

Fair Share II's allocation formula consisted of fixed and variable components. The fixed component was based on the higher of a dealership's planned sales volume or its average actual sales for the three years subsequent to the adoption of Fair Share II. The variable component was based primarily on a dealer's rate of sales over time. A dealer's "days supply," the number of days it would take the dealer to sell its inventory at its current sales rate, thus was critical to dealers who wished to gain more vehicles in subsequent allocations.[2] SNE used the allocation formula to initially allocate 88.5% of the 124,976 vehicles that SNE sold during the class period. See Appendix to Pls.' Mot. for Summ. J. (Pls.' App.) at Tab 91, Neels Report, Ex. 2.

2. Discretionary Vehicles

Fair Share II initially authorized SNE to withhold up to 10% of each vehicle shipment from the regular allocation process, but SNE later revised the plan to permit it to withhold up to 15% of Legacy models and up to 10% of all other models. Def's App. at Tab 60, Eddy Aff., Ex. A., Ex. F. The plan provided that these "discretionary vehicles" were "to be used as demonstrators by [SNE]; vehicles used for major auto shows; vehicles set aside to assist dealers who, at

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[2] A dealer's days supply was "calculated every day a sales report [was] generated by taking the total number of vehicles reported . . . minus allowable demos. This number [was] divided by the base sales rate established during the most recently concluded two complete industry months." Defs.' App. at Tab 60, Eddy Aff., Ex. A.

the sole discretion of [SNE], need assistance; and vehicles delivered to VIPs." Id. at Ex. A. Elsewhere, the plan characterized discretionary vehicles as vehicles that were to be used for "purposes such as market action[s]." Id. Discretionary vehicles comprised 11.5% of all vehicles distributed by SNE during the class period. Pls.' App. at Tab 91, Neels Report, Ex. 2.

3. Turndown Vehicles

SNE's dealers rejected approximately 20% of the vehicles that were initially allocated to them under Fair Share II. See Pls.' App. at Tab 89, Neels Aff., Ex. 7. Although Fair Share II did not specify how these "turndown" vehicles should be reallocated, SNE reserved the right to redistribute them to dealers of its choosing.

B. Accessories

SNE distributes vehicles with a variety of accessories that are installed by or at SNE's direction.[3] Vehicles distributed by SNE during the class period were equipped with more than $ 53 million in accessories, resulting in an average charge to dealers of $ 427 per vehicle.[4] See id. at Ex. 3.

SNE selected the mix of accessories that were installed on turndown and discretionary vehicles during the class period. While SNE claims that dealers were free to choose whether accessories would be installed on regular allocation vehicles, the dealers assert that SNE used a variety of coercive measures to pressure them to also purchase accessories for these vehicles. During the class period, the average charge to dealers for accessories installed on

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[3] Vehicles are also often equipped with accessories installed by Fuji Heavy Industries at the factory. I use the term "accessories" more narrowly to refer only to accessories installed after SNE receives a vehicle from SOA.

[4] All dollar values cited in this Memorandum and Order are stated in 2001 dollars.

turndown vehicles was $ 490 per vehicle, the average charge for accessories installed on discretionary vehicles was $ 742 per vehicle, and the average charge for accessories installed on regular allocation vehicles was $ 338 per vehicle. See id. at Ex. 2.

SNE derived a significant share of its profit from the sale of accessories. To encourage such sales, it paid its district managers commissions on accessory sales that typically amounted to between 40% and 60% of their total compensation. District managers were not entitled to these commissions unless their average gross profit on such sales met a prescribed target, which initially was $ 150 but which was later reduced to $ 140. The $ 140 target required district managers to average approximately $ 475 in accessory sales per vehicle in order to earn any accessory-based commission for that period. See Pls.' App. at Tab 33, Boch Aff., P53. SNE also provided district managers with "focus letters" identifying overstocked accessories that they were encouraged to sell.

C. Conditioning

Plaintiffs have produced both statistical and anecdotal evidence to support their contention that SNE required dealers to purchase accessories for regular allocation vehicles in order to obtain access to turndown and discretionary vehicles. Plaintiffs' statistical evidence consists of a multiple regression analysis using data obtained from SNE. Plaintiffs' expert, Dr. Kevin Neels, contends that this analysis establishes "a strong and statistically significant relationship between the volume of accessories purchased by Dealers and the number of discretionary and turndown cars they subsequently purchased." Pls.' App. at Tab 91, Neels Report at 19. According to Dr. Neels, "depending upon the model one considers, [the data] show[s] that $1,000 per car in accessory purchases results in a dealer receiving, on average, from 1.6 to 4.3 additional discretionary cars in subsequent allocations, and from 1.5 to 3.3 additional

turndown cars. In all cases, the results were statistically significant, indicating that they represent systematic effects, and are highly unlikely to be the result merely of random variation." Id.

Plaintiffs' anecdotal evidence consists primarily of statements obtained from dealers and former employees of SNE. Some of these statements specifically allege that SNE's district managers conditioned access to turndown and discretionary vehicles on a dealer's agreement to purchase accessories for regular allocation vehicles. See Pls.' App. Tab 21, Prevatt Depo. at 107-08; Tab 43, Smith Oral Aff. at 13; Tab 17, Marino Depo. at 105-06. Other statements describe additional techniques that district managers used to induce dealers to purchase accessories. For example, district managers sometimes altered the color and model mix of vehicles assigned to particular dealers or otherwise tampered with computer-based allocations. See Pls.' App. at Tab 21, Prevatt Depo. at 47-48. On other occasions, district managers refused to fill "sold orders" from dealers who did not purchase enough accessories.[5] Pls.' App. at Tab 25a, Smith Depo. at 97-98. District managers allegedly also told dealers that they would suffer in unspecified ways if they did not purchase accessories for regular allocation vehicles.

D. Concealment

Plaintiffs assert that SNE repeatedly misled them concerning its conditioning practices. On November 21, 1996, Appelbe and SNE employee, Richard Cirami, sent a letter to the dealers stating that "accessories are strictly optional! You do not have to purchase any accessories on any Subaru you purchase from SNE . . . ." Pls.' App., Tab 54 (original emphasis). At a dealers' advisory board meeting on October 23, 1996, SNE's representatives informed the dealers that "no vehicles will be pre-accessorized in the

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[5] A "sold order" results when a dealer sells a car that the dealer does not presently have on his lot, but that SNE lists in its inventory. The dealer submits the "sold order" to SNE for fulfillment.

future with the exception of Safari and Rally [models] which the dealers will receive one introductory vehicle and then order as they desire." Pls.' App., Tab 53. In a March 10, 1998 letter to dealer Thomas Camilleri, an SNE representative similarly stated that "you are always entitled to purchase vehicles with or without port installed accessories . . . ." Pls.' App., Tab 58. Plaintiffs contend that these statements were false because SNE concedes that it selected the accessories that were installed on discretionary and turndown vehicles, and the above-cited evidence demonstrates that dealers also were coerced into purchasing accessories for regular allocation vehicles.

II. ANALYSIS

Plaintiffs' claims can be grouped into three categories for purposes of analysis. The first category consists of claims challenging both SNE's admitted practice of conditioning access to turndown and discretionary vehicles on a dealer's agreement to purchase accessories for those vehicles, and its alleged practice of conditioning access to turndown and discretionary vehicles on a dealer's agreement to purchase accessories for regular allocation vehicles.[6] The second category consists of claims that defendants misled them concerning SNE's conditioning practices. The third category includes claims alleging that defendants used other coercive means in addition to conditioning to induce dealers to purchase accessories.

In the sections that follow, I offer my reasons for concluding that plaintiffs' first and second category claims are not viable. I also explain why plaintiffs' third category claims may not be amenable to class action treatment. In brief, I conclude that SNE's conditioning practices do not violate the ADDCA or the state dealer acts and will not support a RICO extortion claim because they are not coercive; they do not violate the antitrust laws because SNE

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[6] I refer to both forms of conditioning collectively as SNE's "conditioning practices."

lacks market power in the relevant tying product market; and they do not breach SNE's dealer agreements because they are not unlawful, unethical, or inequitable. Plaintiffs' second category claims fail because plaintiffs cannot demonstrate that they were injured by SNE's alleged fraud scheme. Finally, although plaintiffs have produced evidence that conceivably could support many of their third category claims, those claims are subsidiary to the first category claims and, by themselves, may not warrant class action treatment because common questions do not predominate and a class action would not be superior to other forms of adjudication.

I explain my reasoning as it bears on each category of claim in turn.

A. First Category Claims

1. The ADDCA and State Dealer Acts

Plaintiffs claim that SNE's conditioning practices violate the ADDCA and the state dealer acts. I evaluate these claims by first describing the federal and state statutes on which the claims are based.

a. The ADDCA

The ADDCA provides automobile dealers with a cause of action for damages resulting from a manufacturer's failure "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with [the] dealer." [7]

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[7] SNE does not challenge plaintiffs' contention that it is an "automobile manufacturer" as that term is defined in the ADDCA. See 15 U.S.C. § 1221(a) (1998) (an automobile manufacturer is "any person, partnership, corporation, association or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles").

15 U.S.C. § 1222 (1998). The term "good faith" is defined as:

> the duty . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. § 1221(e) (original emphasis).

The First Circuit has determined that good faith under the ADDCA has a "'limited and restricted meaning.'" H.D. Corp. of P.R. v. Ford Motor Co., 791 F.2d 987, 990 (1st Cir. 1986) (quoting Wallace Motor Sales, Inc., 780 F.2d 1049, 1056 (1st Cir. 1985)). Lack of good faith "'must be found in the context of actual or threatened coercion or intimidation.'" Id. The "'coercion or intimidation must include a wrongful demand that would result in penalties or sanctions if not complied with.'" Id. Further, it "'must be actual; the mere fact that a dealer may have felt it had been coerced or intimidated is not sufficient.'" Id.

b. The State Dealer Acts

All of the states in which SNE operates have enacted statutes which, like the ADDCA, are designed to protect dealers from coercive and other unreasonable practices by manufacturers. New Hampshire's dealer statute is typical. It provides, in pertinent part, that it is unlawful for a manufacturer to "coerce or attempt to coerce" any dealer to

> Order or accept delivery of any motor vehicle or vehicles, appliances, equipment, parts or accessories therefor, or any other commodity not required by law, which such motor vehicle dealer has not voluntarily ordered, or order or accept delivery of any motor

> vehicle with special features, appliances, accessories or equipment not included in the list price of such motor vehicles as publicly advertised by their manufacturer . .
>
> .

N.H. Rev. Stat. Ann. ("RSA") § 357-C:3 (1995 & Supp. 2002).[8]

The Maine, Massachusetts, and Rhode Island dealer acts similarly make it unlawful for a manufacturer to "coerce, or attempt to coerce" a dealer to purchase accessories.[9] Maine Rev. Stat. Ann. tit. 10, § 1174(2) (1997 & Supp. 2002);[10] Mass. Gen. Laws Ann. Ch. 93B § 4(2)(1997 & Supp. 2003);[11] R.I. Gen. Laws § 31-5.1-4(b) (2002). The Connecticut dealer act makes it unlawful for a manufacturer to "require" a dealer to purchase accessories, Conn. Gen. Stat. Ann. § 42-133bb (2003), and the Vermont dealer act makes it unlawful for a manufacturer to "require or to coerce" a dealer to purchase accessories, Vt. Stat. Ann. tit. 9 § 4096 (2002).

Plaintiffs argue that they need not prove that SNE's conduct was coercive to support their state dealer act claims. They base this argument on the First Circuit's decision in General GMC, Inc. v. Volvo White Truck Corp., 918 F.2d 306 (1st Cir. 1990), which concluded that the Massachusetts dealer act "may

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[8] Unlike the other New England states which leave the term "coerce" undefined, New Hampshire defines the term as "the failure to act in a fair and equitable manner in performing or complying with any terms or provisions of a franchise or agreement; provided, however, that recommendation, persuasion, urging or argument shall not be synonymous with 'coerce' or lack of 'good faith'." RSA 357-C:1, XX.

[9] Maine omits the comma: "coerce or attempt to coerce." Maine Rev. Stat. Ann. tit. 10, § 1174(2) (1997 & Supp. 2002).

[10] The Maine Legislature amended the Maine dealer act in 1997 to also state that "the allocation of new motor vehicles in the State must be made on a fair and equitable basis." Maine Rev. Stat. Ann. tit. 10, § 1174(3)(A) (Supp. 2002). Plaintiffs do not base their dealer act claims on this provision

[11] The Massachusetts legislature amended the Massachusetts dealer act in 2002 to specifically allow distributers to use up to 15% of all vehicles for discretionary purposes. Mass. Gen. Laws Ann. Ch. 93B § 4(2)(b) (1997 & Supp. 2003). Since this amendment was not in effect during the class period, it does not alter my analysis.

encompass broader conduct . . . than mere coercion and intimidation." Id. at 308. Plaintiffs' reliance on this excerpt is misplaced, however, because the First Circuit was applying § 4(1) of the Massachusetts dealer act, which broadly prohibits "any action which is arbitrary, in bad faith, or unconscionable . . .", id. (quoting Mass. Gen. L. Ch. 93(B) § 4(1)), rather than § 4(2), which is at issue here and which requires proof that a manufacturer "coerced or attempted to coerce" a dealer to purchase accessories.[12] Obviously, I cannot ignore the coercion requirement contained in § 4(2) of the Massachusetts act and all but two of the other dealer acts simply because other sections of the acts do not require proof of coercion. Accordingly, I reject plaintiffs' contention that coercion is not an element of those state dealer acts that expressly require proof of coercion.

Plaintiffs argue in the alternative that even if coercion is a necessary element of an accessory conditioning claim under most of the state dealer acts, their use of the term does not require a wrongful demand and a threat of sanctions as is the case under the ADDCA. Plaintiffs thus appear to assert that a manufacturer acts coercively whenever it conditions access to anything of value on a dealer's agreement to purchase accessories. I also reject this argument. The accessory purchase provisions of the state dealer acts were enacted in part to prevent manufacturers from using improper economic pressure to force dealers to purchase accessories. Nothing in the language, structure, or legislative history of the acts suggests that they were designed to also prohibit manufacturers from engaging in the generally accepted business practice of offering incentives to encourage dealers to purchase accessories. Accordingly, if a state dealer act requires proof of coercion, I construe that requirement to embody the same type of coercion as is required under the ADDCA. See Colonial Dodge, Inc. v. Chrysler Corp., 11 F. Supp. 2d 737, 744 (D. Md. 1996) (noting that "'coercion' under both the [Maryland Dealer Act] and the

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[12] These provisions were recodified by the 2002 amendment to the act. See Mass. Gen. Laws Ann. Ch. 93B § 4(2)(b) (1997 & Supp. 2003).

ADDCA embodies the same concept, and accordingly the same analysis applies.").[13]

c. Analysis

As I have noted, coercion under both the ADDCA and the state dealer acts requires a wrongful demand coupled with a threat of sanctions. The clearest cases of coercion under this definition are those in which a manufacturer threatens to withhold what it knows to be a dealer's property if the dealer refuses to comply with the manufacturer's demands. Such conduct necessarily is coercive because the manufacturer is using an unlawful threat to induce compliance with the manufacturer's demands. In contrast, a manufacturer's offer of incentives to induce compliance ordinarily is not coercive because the dealer has no entitlement to the property that the manufacturer is offering to provide. See, e.g., Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., 773 F.2d 1193, 1210 (11th Cir. 1985) (offer of extra vehicles from a pool of discretionary vehicles is not coercive); Colonial Dodge, 11 F. Supp. 2d. at 744 (same). This case appears to qualify as a permissible use of incentives rather than an impermissible use of sanctions under this dichotomy because plaintiffs agree that they had no contractual right to receive either turndown or discretionary vehicles.

Plaintiffs nevertheless offer two arguments to support their

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[13] Plaintiffs have not offered a distinct argument based on the text of either the Connecticut dealer act, which makes it unlawful for a manufacturer to "require" the purchase of accessories, Conn. Gen. Stat. Ann. § 42-133bb, or the Vermont dealer act, which makes it unlawful for a manufacturer to "require or to coerce" such purchases, Vt. Stat. Ann. tit. 9 § 4096. This is understandable because, while neither act expressly requires proof of coercion, the accessory purchase provisions of both acts share the same legislative purpose as the other dealer acts at issue in this case: that is, to prevent manufacturers from using undue economic pressure to compel dealers to purchase accessories. Thus, while I recognize that a manufacturer would violate both states' acts if it required dealers to purchase accessories to obtain a dealership or to obtain something of value to which the dealer is otherwise entitled, I do not construe either act to ordinarily bar a manufacturer from requiring that dealers purchase accessories in order to obtain a benefit to which the dealer is not otherwise entitled.

claim that SNE's conditioning practices were coercive. First, they assert, without offering any argument or supporting authority, that even if SNE can control the allocation of turndown and discretionary vehicles for most purposes, it cannot use the allocation process for "the legislatively forbidden purpose of selling unwanted accessories." Pls.' Mem. at 41. The difficulty with this argument is that it finds no support in the statutory language on which it is based. Neither the ADDCA nor the state dealer acts bar all means by which manufacturers may attempt to sell dealers unwanted accessories. Rather, they merely forbid the use of coercive means to effect such sales. Thus, I reject plaintiffs' claim that SNE's practices are coercive solely because they allegedly were developed to encourage dealers to purchase accessories.

Plaintiffs next contend that even if the ends that SNE's alleged conditioning practices were designed to achieve do not make its practices coercive, its chosen means - the use of its power to allocate turndown and discretionary vehicles - is coercive. This argument begins with the major premise that an otherwise permissible incentive program will be deemed to be coercive if it threatens to deny dealers access to resources that they require to conduct their operations. It then proceeds with the minor premise that plaintiffs required access to turndown and discretionary vehicles to conduct their operations. I accept the major premise that underlies plaintiffs' argument. For example, I agree that a manufacturer's threat to deny access to all or substantially all vehicles to dealers who refuse to purchase accessories would be coercive regardless of whether the manufacturer was contractually entitled to allocate vehicles to dealers of its choosing. I ultimately am unpersuaded by plaintiffs' argument, however, because the facts do not support their minor premise. In other words, the power that SNE retained under Fair Share II to control the allocation of turndown and discretionary vehicles simply was not sufficient to qualify SNE's use of that power as coercive.

Plaintiffs do not challenge SNE's contention that its dealers for the most part were highly successful during the class period

when compared both with other Subaru dealers and other automobile dealers in general. While uncooperative dealers might have received fewer of the most desirable vehicles to sell and thus may have faced the prospect of smaller allocations if, as a result, they failed to sell vehicles as rapidly as their more cooperative peers, the record is devoid of evidence suggesting that SNE's conditioning practices threatened any dealer's ability to conduct successful business operations. The mere fact that uncooperative dealers may have fared less well under Fair Share II than those who agreed to accept the conditioning practices, does not mean that SNE's use of the practices was coercive. An incentive program does not become coercive merely because it produces losers as well as winners. Here, the fact that more than 88% of all vehicles were initially allocated to dealers without regard to their accessory purchases belies any claim that SNE's conditioning practices threatened to deny dealers access to vehicles that they need to conduct viable business operations.[14] Thus, I reject plaintiffs' claim that the conditioning practices violated either the ADDCA or the state dealer acts.

2. Hobbes Act Claims

The dealers identify three distinct RICO claims in their second amended complaint. In Count I they claim that SNE is liable because it conducted or participated in the conduct of an enterprise through a pattern of racketeering. See 18 U.S.C. § 1962(c) (2000). They charge in Counts II and III that Boch and Appelbe, respectively, are liable on the same theory. See 18 U.S.C. § 1962(c). All three claims are based on plaintiffs' assertion that the defendants violated the Hobbes Act by extorting the dealers through their option-packing scheme and committing various acts of mail and wire fraud to conceal the existence of the scheme. I deal here with plaintiffs' claim that

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[14] Plaintiffs also allege that initial allocation vehicles were not distributed fairly. While I agree that, if proved, such conduct might well be unlawful, I am not convinced that those claims are amenable to class action treatment. Since much of the evidence is anecdotal and dealer or district manager specific, I treat those allegations as category II claims, and analyze them below.

SNE's conditioning practices qualify as extortion.

The Hobbes Act imposes criminal penalties on any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951(a). The act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." Id. at § 1951(b)(2). Fear of economic loss, generally called "economic fear," is included within the meaning of the statutory term "fear." See, e.g., United States v. Hathaway, 534 F.2d 386, 394 (1st Cir. 1976). Not every business use of economic fear, however, is inherently unlawful. See United States v. Sturm, 870 F.2d 769, 773 (1st Cir. 1989). "Indeed, the fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions." Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523 (3rd Cir. 1998). One court has distinguished between legitimate and illegitimate uses of economic fear by stating:

> In a 'hard bargaining' scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant, but in an extortion scenario the alleged victim has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.

Id. at 525 (quoting Viacom Int'l, Inc. v. Icahn, 747 F. Supp. 205, 213 (S.D.N.Y. 1990), aff'd on other grounds, 946 F.2d 998 (2d Cir. 1991)). I agree with this reasoning.

As I have already noted, plaintiffs had no pre-existing right to either turndown or discretionary vehicles. Thus, SNE's alleged threat to withhold access to such vehicles unless a dealer agreed to purchase accessories does not give rise to the kind of economic fear that the Hobbes Act was designed to address.

Accordingly, defendants are entitled to summary judgment to the extent that plaintiffs' RICO claims are based on the assertion that SNE's alleged conditioning practices qualify as extortion under the Hobbes Act.

3. Antitrust Claims

Plaintiffs argue that defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1996), and Section 3 of the Clayton Act, 15 U.S.C. § 14 (1997), by illegally tying the sale of turndown and discretionary vehicles to the purchase of accessories for both these vehicles and regular allocation vehicles. To prove what they assert is a per se violation of the antitrust laws, plaintiffs must demonstrate that: (1) their claim concerns both a "tying" product, in this case, Subaru vehicles, and a distinct "tied" product, in this case, accessories; (2) SNE conditioned the sale of Subaru vehicles on the purchase of accessories; (3) SNE has sufficient market power in the relevant market for Subaru vehicles to appreciably restrain trade in the market for accessories; and (4) as a result, SNE was able to foreclose a not insubstantial amount of interstate commerce in the market for accessories. See Borschow Hosp. and Med. Supplies, Inc. v. Cesar Castillo, Inc., 96 F.3d 10, 17 (1st Cir. 1996); ABA Antitrust Law Developments, 179 (5th ed. 2002) (setting forth elements of a per se tying claim).

Defendants challenge plaintiffs' tying claim by arguing that they cannot prove that SNE had market power in the relevant tying product market. They begin their argument by defining the relevant market as the New England market for new vehicles. They then cite the First Circuit's decision in Grappone v. Subaru of New England, Inc., 858 F.2d 792, 797-98 (1st Cir. 1988), for the proposition that SNE lacks market power in the new vehicle market. Plaintiffs respond by claiming that defendants have misidentified the relevant tying product market. Relying on the Supreme Court's decision in Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992), they claim that the relevant market should be limited to the New England market for new Subaru

vehicles because they have been "locked-in" to the purchase of Subaru vehicles by their dealer agreements and the significant costs that they have incurred to establish their dealerships. They assert that SNE has market power in this more narrowly defined market because SNE is the exclusive distributor of new Subaru vehicles in New England.

As I explain in greater detail below, I reject plaintiffs' argument because it mistakenly confuses the contract power that SNE has acquired by virtue of its dealership agreements with the market power that SNE must possess before it can be held liable for a tying violation. To explain my thinking, I begin by describing the First Circuit's decision in Grappone and the Supreme Court's decision in Kodak. I then explain why Kodak does not apply in cases such as this where a distributor's power to require a dealer to purchase one product in order to obtain another arises from a contractual commitment, rather than market forces.

a. Grappone

In Grappone, a Subaru dealer brought a tying claim against SNE alleging that it had conditioned vehicle allocation on the dealer's agreement to purchase spare parts. See id. at 793. In rejecting this claim, the court determined that the dealer had failed to show that "Subarus had any special or unique features, such as patents or copyrights, that might demonstrate market power." Id. at 798. The court also concluded that SNE lacked market power in the new vehicle market because, its market share in that market was "minuscule" and thus SNE lacked the power to raise prices for its vehicles above a competitive level. Id. at 797-98. The First Circuit accordingly concluded that the dealer had "failed to prove that the per se anti-tying rules apply in this case." Id. at 800.

b. Kodak

In Kodak, which was decided several years after Grappone, the Supreme Court was presented with a case in which a

manufacturer allegedly used market power in an aftermarket for unique replacement parts to compel purchasers of the replacements parts to also purchase maintenance and repair services from Kodak.

Kodak manufactured and sold photocopiers and micrographic equipment. See Kodak, 504 U.S. at 455, 456. It also sold two aftermarket products related to its equipment: replacement parts and service. See id. at 455, 457. After many customers had already purchased Kodak equipment, numerous independent service organizations (ISOs) began to offer service for Kodak's machines at a lower price than that charged by Kodak. See id. at 455, 457. Kodak reacted by tying the availability of its replacement parts, which were the only parts that could be used in servicing its machines, to the purchase of service from Kodak. See id. at 457, 458. As a result, the ISOs were no longer able to compete with Kodak in the market for equipment servicing. See id. at 458.

A group of ISOs sued Kodak, claiming, inter alia, that Kodak had tied the sale of replacement parts to the purchase of maintenance and repair services, in violation of § 1 of the Sherman Act. See id. at 459. In response, Kodak insisted that it was entitled to judgment as a matter of law because the existence of competition in the equipment market, which was conceded, necessarily meant that there must be competition in the derivative aftermarket for replacement parts. See id. at 465-66. Therefore, Kodak argued, it lacked sufficient power in the market for replacement parts (the "tying product") to commit a per se tying violation. See id. Kodak's proposed legal rule-that "equipment competition precludes any finding of monopoly power in derivative aftermarkets," id. at 466 (internal quotation marks omitted)--stemmed from an assumption about the perfect operation of the "cross-elasticity of demand" between the primary equipment market and the derivative aftermarkets. Id. at 469 (internal quotation marks omitted).

The Court rejected Kodak's contention, concluding instead that "there is no immutable physical law-no 'basic economic

reality'-insisting that competition in the equipment market cannot coexist with market power in the aftermarkets." *Id.* at 471. Rather, the court held that the ISOs were entitled to the opportunity to prove that two factors-"information costs" and "switching costs"-"foiled the simple assumption that the equipment and service markets act as pure complements to one another." Id. at 477. The Court determined that information costs could undermine the "cross-elasticity of demand" between the equipment market and derivative aftermarkets if consumers who purchased Kodak equipment lacked the information necessary to calculate the total "life-cycle" cost of the equipment, including the cost of tied parts and service, at the time that they decided which manufacturer's machines to purchase. See id. at 473-76. The Court also reasoned that consumers who purchased Kodak equipment might be willing to pay supra-competitive prices for Kodak service in order to get the replacement parts they needed to maintain their original investment in the equipment, particularly if their only alternative was to switch to another manufacturer's machines and thereby abandon the substantial investment already made in the Kodak equipment. See id. at 476-77.

Kodak has spawned several judicial decisions which consider whether power acquired as a result of a contractual lock-in can be equated with the market power that is required to support a tying claim. Although not all courts and commentators agree, the prevailing view is that a contractual lock-in ordinarily does not give rise to concerns that the antitrust laws were enacted to address. See, e.g., Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1222 (11th Cir. 2002); Hack v. President and Fellows of Yale College, 237 F.3d 81, 85 (2d Cir. 2000); Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3d Cir. 1997); United Farmers Agents Assoc., Inc. v. Farmers Ins. Exchange, 89 F.3d 233, 236-37 (5th Cir. 1996); Tony Lin, Distinguishing Kodak Lock-in and Franchise Contractual Lock-in, 23 S. Ill. U. L.J. 87 (1998); Alan H. Silberman, The Myths of Franchise "Market Power", 65 Antitrust L.J. 181 (1996); but see Benjamin Kline, Market Power in Franchise Cases in the Wake of Kodak: Applying

Post-Contractual Hold-up Analysis to Vertical Relationships, 67 Antitrust L.J. 283 (1999).

c. Application

Plaintiffs do not question the First Circuit's conclusion in Grappone that SNE lacks market power in the New England vehicle market. Nor do they take issue with the prevailing view that contract power ordinarily cannot, by itself, establish the market power necessary to support a tying claim. Nevertheless, they argue that the relevant tying product market in this case should be limited to the market for Subaru vehicles because SNE locked them in to their dealerships by misleading them into believing that accessories were optional.[15] In other words, plaintiffs contend that power acquired through a contractual lock-in may substitute for market power if the lock-in was induced by misrepresentation. I reject this contention.

A contractual lock-in of the type at issue here does not adversely affect either consumers or competitors in the absence of true market power, regardless of whether the lock-in was induced by misrepresentation or was the result of good faith negotiation. See Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law (2d ed. 2002) P519 at 149-50. If, as plaintiffs concede was the case, the new vehicle market was competitive during the class period, SNE could not have induced consumers to pay inflated prices for Subarus simply because its dealers were contractually locked in to their dealerships. Nor could SNE have used its alleged power over vehicle allocation to foreclose a significant portion of an otherwise competitive market for accessories. While the dealers

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[15] Defendants dispute plaintiffs' claim that they were locked into the purchase of Subaru vehicles. To support their position, defendants note that Subaru dealers are free to own other dealerships; that they may terminate their dealerships at any time on 60-days notice; that SNE must purchase most inventory and Subaru specific tools when a distributorship is terminated; and that dealerships and the real estate investments that have been made by dealers to develop their dealerships are readily saleable. While this argument may well have merit, I nevertheless accept for purposes of analysis plaintiffs' contention that they were contractually locked into the purchase of Subaru vehicles.

may have suffered if, as they claim, SNE fraudulently induced them to sign their dealer contracts and incur substantial costs in building their dealerships, the law of fraud, misrepresentation, and unfair competition exists to address such concerns. See id. at 149 (rejecting view that contractual lock-in claim is viable as a tying claim if "the lock-in occurs as a result of seller misrepresentation"). In short, no purpose would be served in turning antitrust law into a substitute for this well-established body of state law. See id. Thus, I cannot permit plaintiffs to redefine the relevant market as the market for new Subaru vehicles merely because the dealers claim that SNE induced them to acquire their dealerships through a pattern of deception.

Because plaintiffs have failed to demonstrate that SNE has appreciable market power in the relevant tying product market, their tying claim fails.

4. Contract Claim

Plaintiffs assert that SNE's conditioning practices breached its contractual obligations to allocate vehicles "equitably" and to generally behave "in a lawful and ethical manner." Defendants respond by claiming its practices were not unlawful, unethical, or inequitable because (1) the practices do not violate state or federal law; (2) most vehicles were allocated using the allocation formula specified in Fair Share II; and (3) Fair Share II, which specified the manner in which SNE was required to implement its duty to allocate vehicles equitably, expressly authorized SNE to use discretionary vehicles for market actions such as encouraging incentive purchases and did not prohibit SNE from using turndown vehicles for the same purposes. Plaintiffs' only response to these arguments is to claim in a conclusory fashion that "defendants illegal, coercive and deceptive conduct violates SNE's promises" to "allocate vehicles fairly and equitably" and to at all times behave in a "lawful and equitable manner." Pls.' Mem. at 75. This is not an acceptable response.

As I have already explained, SNE's conditioning practices

did not violate the ADDCA, the state dealer acts, the Hobbes Act, or the federal antitrust laws. Moreover, its use of discretionary vehicles to encourage market actions such as the purchase of accessories was expressly authorized by Fair Share II, and its reservation of the right to allocate turndown vehicles to dealers of its choosing did not violate the dealer agreements because these vehicles had already passed through the agreed-upon allocation system. Finally, it is undisputed that more than 88% of all vehicles were initially allocated under Fair Share II using a formula that did not take into account whether a dealer had agreed to purchase accessories. Under these circumstances, I fail to see how SNE's conditioning practices were illegal, unethical, or inequitable.

B. Second Category Claims

Plaintiffs' second category claims allege civil RICO violations arising from a pattern of mail and wire fraud. The alleged fraud scheme on which these claims are based was a scheme to conceal from dealers the existence of SNE's alleged option-packing scheme. As I explain below, these claims fail for the simple reason that plaintiffs have failed to demonstrate that they were injured as a result of the fraud scheme. See Bonilla v. Volvo Car Corp., 150 F.3d 62, 66 (1st Cir. 1998); see also Sys. Mgmt., Inc. v. Loiselle, 303 F.3d 100, 104 (1st Cir. 2002) (assuming that plaintiff must prove both "but for" and proximate causation to support a civil RICO claim based on mail fraud).

Plaintiffs assert that defendants' fraud scheme caused them three types of injuries: (1) costs incurred to purchase unwanted accessories; (2) costs incurred to pay floor plan interest for vehicles that took longer to sell because they were equipped with accessories; and (3) reductions in the value of their dealerships. Plaintiffs have failed to explain how the alleged fraud scheme could have contributed in any substantial way to any of these claimed injuries. Any added costs that plaintiffs may have incurred to purchase unwanted accessories or to pay floor plan interest on vehicles that took longer than expected to

sell would have been directly caused by the option-packing scheme rather than the fraud scheme. The fraud scheme could only have substantially contributed to these injures if it caused dealers to lock themselves in their dealer contracts on the basis of a mistaken impression that the option-packing scheme had been discontinued. Plaintiffs have offered no evidence suggesting that any dealer signed a dealer contract or made a substantial investment in a dealership as a result of any of the allegedly fraudulent statements which give rise to their claims. Plaintiffs' assertion that the fraud scheme caused a diminution in the value of their dealerships fares no better because the expert witness that they have designated to testify on this issue states only that the dealerships decreased in value as a result of "the disparaging and litigious relationship of Subaru of New England and Mr. Boch," Pls.' Mem. at 66, rather than the fraud scheme.

Because plaintiffs have failed to show that they suffered any injury as a result of defendants' alleged fraud scheme, defendants are entitled to summary judgment with respect to plaintiffs' second category claims.

C. Third Category Claims

When I certified this case for class action treatment, I devoted most of my attention to plaintiffs' first and second category claims. See George Lussier Enters., Inc. v. Subaru of New England, 2001 D.N.H. 143* 18-58. Because I have determined that these claims are no longer viable, it makes sense to reexamine my prior determination that class certification is warranted with respect to plaintiffs' third category claims.

1. Decertification Standard

A class certification order may be "altered or amended," Fed. R. Civ. P. 23(c)(1), if "upon fuller development of the facts, the original determination appears unsound." See id. at adv. committee notes. Consequently, I am "required to reassess

[my] class rulings as the case develops." Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3rd Cir. 1998); see also Lamphere v. Brown Univ., 553 F.2d 714, 719 (1st Cir. 1977) (Rule 23(c)(1) "provides for reconsideration of the [certification] decision as the case progresses."); Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999). If it "appears that the requirements of Rule 23 are not in fact met" after the facts are developed and the case progresses, I may decertify the class. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 572 (2d Cir. 1982).

I apply this standard in reviewing plaintiffs' third category claims.

2. Analysis

Plaintiffs' third category claims consist of allegations that SNE's district managers used coercive means in addition to conditioning to compel dealers to purchase unwanted accessories. Unlike plaintiffs' conditioning claims, these claims depend entirely upon anecdotal evidence that SNE's district managers employed allegedly unlawful pressure tactics such as altering the color mix of vehicles assigned to uncooperative dealers, refusing to fill sell orders placed by such dealers, and threatening dealers that they would suffer in unspecified ways if they did not purchase accessories.

Although this evidence may support viable claims that certain district managers engaged in unlawful conduct when selling accessories to particular dealers, it does not justify an inference that district managers' misconduct was widespread or that class members experienced the misconduct in similar ways. Under these circumstances, I do not see how I could determine the viability of any class member's category three claims in a single trial. Instead, determining whether the allegedly coercive means used by a district manager in any particular case were, in fact, unlawful will require a fact-intensive inquiry into each dealer's interaction with particular district managers. Class action treatment ordinarily is not warranted for such claims

because any attempt to resolve them in a common trial will break down into a series of individualized mini-trials on issues that will substantially predominate over issues common to the class. See Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 (1st Cir. 1997).

Given my concern that plaintiffs' category three claims may not be appropriate for class action treatment, I see no point in attempting to resolve defendants' challenge to these claims at the present time. Instead, I deny defendants' summary judgment motion with respect to these claims without prejudice and direct plaintiffs to show cause on or before October 30, 2003 as to why I should not decertify the class with respect to these claims.

III. CONCLUSION

For the reasons set forth in this Memorandum and Order, I deny plaintiffs' motion for summary judgment (doc. no. 381), grant defendants' motions for summary judgment (doc nos. 368, 369 and 370) with respect to plaintiffs' category one and two claims and deny their motions without prejudice with respect to plaintiffs' category three claims. I direct the plaintiffs to show cause on or before October 30, 2003 as to why I should not decertify the class with respect to plaintiffs' category three claims.

SO ORDERED.

Paul Barbadoro
Chief Judge

September 26, 2003

United States Court of Appeals
For the First Circuit

No. 03-2715

GEORGE LUSSIER ENTERPRISES, INC. D/B/A LUSSIER SUBARU; SULLIVAN COUNTY MOTORS, INC. D/B/A SUBARU OF CLAREMONT; CAMILLERI BROS., INC. D/B/A C&C SUBARU; BALD HILL REALTY, INC. D/B/A BALD HILL SUBARU; KINNEY MOTORS, LTD.; REYNOLDS GARAGE & MARINE,INC.,

Plaintiffs, Appellants,

SUBARU OF WAKEFIELD, INC., BALHD HILL REALTY, INC., d/b/a
BALD HILL SUBARU,

Plaintiffs,

NATIONAL AUTOMOBILE DEALERS ASSOCIATION,

Amicus Curiae,

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH, JR. AND
JOSEPH APPELBE,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Rosenn*, Senior Circuit Judge,
Toruella and Selya, Circuit Judges,
Lynch, Lipez and Howard Circuit Judges.

ORDER OF COURT

Entered: **January 21, 2005**

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

RICHARD CUSHING DONOVAN, Clerk

By: */s/ Margaret Carter*
Chief Deputy Clerk

[cc: Richard B. McNamara, Esq., Gregory A. Holmes, Esq.,
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* Of the Third Circuit, sitting by designation.

15 U.S.C. § 1221. Definitions

As used in this Act --

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to

constitute a lack of good faith.

HISTORY:
(Aug. 8, 1956, ch 1038, § 1, 70 Stat. 1125.)

15 U.S.C. § 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act [enacted Aug. 8, 1956] to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

HISTORY:

(Aug. 8, 1956, ch 1038, § 2, 70 Stat. 1125.)

Supreme Court, U.S.
FILED
JUN 3 - 2005
OFFICE OF THE CLERK

No. 04-1465

IN THE

Supreme Court of the United States

GEORGE LUSSIER ENTERPRISES, INC. d/b/a LUSSIER SUBARU; SULLIVAN COUNTY MOTORS, INC. d/b/a SUBARU OF CLAREMONT; CAMILLERI BROTHERS, INC. d/b/a C&C SUBARU; KINNEY MOTORS, LTD; REYNOLDS' GARAGE & MARINE, INC.,

Petitioners,

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH; JOSEPH A. APPELBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents believe Petitioners' statement of the Question Presented mischaracterizes the case. The question presented is whether an automobile distributor may, consistent with the "good faith" requirement of the Automobile Dealer Day in Court Act, 15 U.S.C. §§ 1221, *et seq.*, offer dealers extra cars, in addition to those to which they are contractually entitled, in order to promote the sale of more fully equipped vehicles.

CORPORATE DISCLOSURE STATEMENT

Respondent, Subaru of New England, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Proceedings Below

Petitioners allege that the defendant automobile distributor, Subaru of New England, Inc. ("SNE"), used cars outside its vehicle allocation system, known as "discretionary" and "turndown" cars, to coerce its dealers to purchase unwanted accessories. In their Second Amended Complaint, Petitioners, on behalf of themselves and a class of present and former New England Subaru dealers, allege, *inter alia*, that SNE violated the "good faith" requirement contained in the Automobile Dealer Day in Court Act, 15 U.S.C. §§ 1221-1225 ("ADDCA"), and prohibitions against coercion contained in the state automobile dealer statutes of each of the six New England states in which the class members and SNE do business.

The undisputed fact that dealers were not entitled to these "extra" cars disposed of Petitioners' claims. Because the dealers had no entitlement to cars outside their earned allocations, both of the lower courts held that the allegation that SNE conditioned access to these extra cars on dealers' purchases of accessories could not, as a matter of law, constitute unlawful coercion. In doing so, the courts relied on a longstanding test that has been adopted by every Circuit that has defined "coercion" under the ADDCA, and on two federal court decisions that rejected virtually identical claims of coercion based on a manufacturer's withholding of extra cars.

1. The District Court Decision

The district judge who presided over this very active litigation for over four years entered summary judgment for defendants based on his thorough review of an extensive summary judgment record and the application of a uniform body of federal and state dealer law. In rejecting plaintiffs' claim of unlawful coercion, the court held:

> As I have noted, coercion under both the ADDCA and the state dealer acts requires a wrongful demand coupled with a threat of sanctions. The clearest cases of coercion under this definition are those in which a manufacturer threatens to withhold what it knows to be a dealer's property if the dealer refuses to comply with the manufacturer's demands. Such conduct necessarily is coercive because the manufacturer is using an unlawful threat to induce compliance with the manufacturer's demands. In contrast, a manufacturer's offer of incentives to induce compliance ordinarily is not coercive because the dealer has no entitlement to the property that the manufacturer is offering to provide. See, e.g., Cabriolet Porsche Audi, Inc. v. American Honda Motor Co. 773 F.2d 1193, 1210 (11th Cir. 1985) (offer of extra vehicles from a pool of discretionary vehicles is not coercive); Colonial Dodge, 11 F. Supp.2d at 744 (same). This case appears to qualify as a permissible use of incentives rather than an impermissible use of sanctions under this dichotomy because plaintiffs agree that they had no contractual right to receive either turndown or discretionary vehicles.

Petition, p. 55.

2. The Court of Appeals Decision

In a unanimous decision, the court of appeals affirmed the district court's entry of summary judgment for the defendants. Relying on its established precedents, the court began:

> In interpreting ADDCA's good faith provision, "[t]his court has read the requirements of the ADDCA very narrowly to require 'actual or threatened *coercion* or intimidation.'" *General GMC, Inc. v. Volvo White Truck Corp., et al.*, 918 F.2d 306, 308 (1st Cir. 1990) (quoting *H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 791 F.2d 987, 990 (1st Cir. 1986) (emphasis added).

Petition, p. 26. Again relying on prior cases, the court recited the universally recognized test for coercion under the ADDCA:

> This Court has held, and we again emphasize, that "coercion or intimidation [under the ADDCA] must include a wrongful demand that would result in penalties or sanctions if not complied with." *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1059 (1st Cir. 1985) (agreeing with several other circuits that "coercion or intimidation must include a wrongful demand which will result in sanctions if met.")[*sic*] That is, to state a cause of action under the ADDCA, the aggrieved dealer must produce evidence that the manufacturer or distributor (1) made a wrongful demand, coupled with (2) sanctions, or threat thereof. *Id.* at 1056. Otherwise, summary judgment is warranted if the

> dealer "has produced no evidence showing that it was subjected to coercion or intimidation" by the manufacturer or distributor. *General GMC*, 918 F.2d at 308.

Petition, p. 26 (footnote omitted).

Applying this standard, the unanimous court agreed with the district court's conclusion that Petitioners had failed to show coercion under the ADDCA. It held:

> Viewing the evidence in the light most favorable to appellants, we find that SNE's conduct does not amount to coercion within the meaning of ADDCA. We simply fail to see how SNE's practice of conditioning access to, or accessorizing, discretionary and turndown cars – cars which dealers concede they had no contractual right to receive – constitutes coercion.

Petition, p. 27.

In reaching this result, the court discussed the decisions in *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., Inc.*, 773 F.2d 1193 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986), and *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F. Supp. 2d 737 (D. Md. 1996), *aff'd*, 121 F.2d 697 (4th Cir. 1997). Both of these cases "found no coercion for various conditions imposed by distributors for dealers' access to vehicles which they were not entitled to receive." Petition, pp. 27-28. Like the district court, the court of appeals adopted the reasoning of these decisions:

> We find these cases persuasive, and thus hold that a manufacturer's conditioning of access to vehicles

> beyond the regular allocation process, without more, does not amount to a "wrongful demand" that would constitute coercion under ADDCA's good-faith requirement. Since dealers are not contractually entitled to these extra vehicles, a manufacturer's decision to impose reasonable conditions for dealer access is neither "wrongful" nor even a "demand." These conditions are not wrongful because they are part of a bargained-for exchange (e.g., accessories for extra cars, taking less-desirable cars to access discretionary highly desirable cars); neither do these conditions constitute a "demand" because dealers need not take these extra cars. Rather, these conditions constitute reasonable business judgments in a free market economy, and "[a] distributor acting honestly is entitled to latitude in making commercial judgments." *Coady Corp. v. Toyota Motor Distrib., Inc.*, 361 F.3d 50, 56 (1st Cir. 2004).

Petition, pp. 28-29.

The panel denied plaintiffs' petition for rehearing, and the full court denied their petition for rehearing *en banc*. Petitioners now seek a writ of certiorari on their claim under the ADDCA.

B. Statement of Facts

1. Respondents' Statement of Undisputed Facts

The undisputed evidence contained in the record portrays a very different picture of SNE's practices from the unsupported assertions set forth in the Petition. The following is a brief recitation.

Since 1971, SNE has been the independent, exclusive regional distributor of new Subaru automobiles in the six New England states. Court of Appeals' Appendix ("CA App.") 0929. It purchases Subaru products from Subaru of America, Inc., ("SOA"), the exclusive United States distributor, and resells them to approximately 60 dealers with whom it has entered into dealership agreements. SNE competes with other regions for allocations of cars from SOA, and with other brands for new car sales in the New England market. It earns cars under SOA's allocation system based on the rate of its dealers' new car sales. CA App. 0907-08. Thus, SNE's success very much depends on the success of its dealers in selling their cars. It is undisputed that SNE's dealers enjoyed great success and profitability during the class period compared to Subaru dealers in other parts of the country and dealers of other brands. CA App. 1492-93, 1506-07.

Since the 1980s, SNE has distributed automobiles to its dealers through a formula known as "Fair Share II." As part of Fair Share II, SNE reserved the right to withhold up to fifteen percent of Subaru Legacy models, and up to ten percent of all other models, from the dealers' allocations and to treat them as "discretionary cars." CA App. 1168, 1199. The remaining 88.5% of the cars were offered to dealers based on a formula that took into account the number of cars each dealer sold and the number of cars in each dealer's inventory. CA App. 1150-56. SNE offered these "regular allocation" cars to dealers without accessories, but the dealers could choose to have accessories added by SNE.

Dealers were not required to purchase the cars SNE offered to them. Dealers often declined to purchase some of their regular allocation cars, and SNE attempted to sell these

"turndowns" to other dealers before the close of each allocation. CA App. 0293-92, 0557, 0567. Turndown cars that were not sold during an allocation were treated in the same manner as discretionary cars.

During dealer orientations, SNE informed dealers that discretionary cars were not part of the dealers' earned allocations and that the cars belonged to SNE. CA App. 1326-27. Dealers uniformly admitted at deposition that they understood that they had no entitlement to discretionary or turndown cars, and that they did not make investments in their dealerships based on any expectation of receiving them. CA App. 0348-49, 0368-78, 0436, 0454, 0528, 0541, 0592, 0615, 0655-56, 0759-60, 0811, 0829-30, 0855, 0889-91.

SNE used discretionary cars for a variety of purposes, such as providing initial supplies of cars to new dealers, rewarding upgrades in dealers' facilities, and helping dealers to fill retail orders for cars that dealers did not have in inventory. CA App. 0282-85, 0304-05, 2252-56. Discretionary cars not used for these purposes were offered to dealers based on SNE's business judgment of where the cars were most likely to sell. *See, e.g.*, CA App. 0287-88, 0558, 0568-69, 2253.

When dealers ordered cars from their regular allocations, they could also choose to order a number of accessories, which SNE would then install on the cars before the dealers took delivery. Although dealers could purchase their regular allocation cars without accessories, they testified that they often purchased accessories on their regular allocation cars voluntarily and in the exercise of their own business judgment, and that the accessories that SNE installed on their

cars both helped to sell the cars and were profitable in their own right. CA App. 0265-70, 0433-36, 0475-80, 0524, 0528, 0595-96, 0613, 0617-19, 0751-53, 0770, 0815, 1314-15. When it selected accessories for discretionary and turndown cars, SNE considered what it had in inventory, but it also selected accessories based on its business judgment concerning current market demand and the promotion of the Subaru brand in New England, consistent with its own economic interest in promoting the dealers' sales. CA App. 0297-301, 0494-99, 0502-03, 0912-14, 0918-19, 0922.

2. Petitioners' Mischaracterizations of the Record

Petitioners' admitted lack of entitlement to the discretionary and turndown cars disposed of their claims of unlawful coercion. Nevertheless, they sought refuge in the lower courts, as they do here, in the assertion of facts finding no support in the record.

For example, Petitioners did not "establish[] that discretionary and turndown cars were simply loaded with whatever was leftover in the warehouse and could not otherwise be sold," Petition, p. 4, and the record does not support this assertion. Nor did the dealers produce "undisputed evidence that the accessories were undesirable, made the cars harder to sell and their cost could not be passed on to consumers." Petition, p. 5. The accessories at issue in this lawsuit included such desirable items as mud guards, floor mats, stereo upgrades, dimming mirrors, roof racks, spoilers, and leather seating – the types of accessories frequently ordered by consumers and commonly found on cars of many makes and models. Indeed, as the district court observed at the summary judgment hearing, there was no evidence that the accessories installed on discretionary and

turndown cars were any different from the accessories that dealers voluntarily ordered on the cars in their earned allocations. CA App. 3002. At deposition, dealers were unable to identify specific instances where they purchased unwanted or undesirable accessories that were sold at a loss. CA App. 0789, 0659-60, 0839, 0273-74, 0756-57, 0523-24. Plaintiffs' expert economist, whose testimony was the only evidence Petitioners proffered to demonstrate that they suffered economic harm, admitted in his deposition that he did not examine any information about the prices at which the cars were sold or the profits dealers made on the sales. CA App. 0719. For these reasons, the district judge concluded that he would not allow the expert "to express any testimony that in my opinion they lost money . . ." CA App. 2964.

Similarly, Petitioners produced no evidence that any member of the dealer class was ever "caught in a downward allocation spiral which would jeopardize their ability to achieve their required sales performance," Petition, p. 6. As the district court held, "the record is devoid of evidence suggesting that SNE's conditioning practices threatened any dealer's ability to conduct successful business operations." Petition, p. 57.

In addition to asserting unsupported facts, the Petition distorts the record. For example, Petitioners repeatedly assert that "the dealers had no real choice but to purchase the 31.5% of cars that SNE denominated as 'turndown' or 'discretionary,' with the unsalable accessories pre-installed." Petition, p. 5. Apart from the absence of evidence that the pre-installed accessories were unsalable, this assertion overlooks the fact that two-thirds of these "extra" cars were originally offered to dealers without pre-installed accessories as part of their regular allocation and were then turned down.

The dealers to whom they were originally offered not only had the choice to buy the cars without accessories, but exercised that choice by refusing to buy the cars at all.

ARGUMENT

A. The Decision Below Is Fully Consistent With the Decisions of All Other United States Courts of Appeals Interpreting "Coercion" Under the ADDCA

1. The Courts of Appeals Have Uniformly Applied the Same Test Applied By the Court Below

All four judges that have considered this matter applied the accepted definition of "good faith" under the ADDCA to conclude that plaintiffs are not entitled to relief. Their conclusions were based on the test that the First Circuit adopted twenty-years ago in *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, that, in order to establish a violation of the ADDCA's "good faith" standard, a dealer's proof of coercion "must include a wrongful demand that would result in penalties or sanctions if not complied with." 780 F.2d 1049, 1056 (1st Cir. 1985). As the court held in *Wallace Motor Sales*:

> This is the first time the meaning of this provision has come up for review in this circuit. Other circuits, however, have unanimously held that the failure to exercise good faith under the Act has a limited and restricted meaning; lack of good faith does not simply mean unfairness, it must be found in the context of actual or threatened coercion. . . . Several circuits have also held that the coercion or intimidation must include a wrongful demand which will result in sanctions if met. [*sic*]

> . . . We agree with those circuits which hold that the coercion or intimidation must include a wrongful demand that would result in penalties or sanctions if not complied with. We also hold that the coercion or intimidation must be actual; the mere fact that a dealer may have felt it had been coerced or intimidated is not sufficient.

Id. (citations omitted).

This "wrongful demand/threat of sanctions" test has been adopted by every federal appellate court that has defined "coercion" under the ADDCA. *See Bob Willow Motor, Inc. v. General Motors Corp.*, 872 F.2d 788, 796 (7th Cir. 1989); *Dreiling v. Peugoet Motors of America, Inc.*, 850 F.2d 1373, 1379 (10th Cir. 1988); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 95-96 (2d Cir. 1987); *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049, 1059 (1st Cir. 1985); *American Motor Sales Corp. v. Runke*, 708 F.2d 202, 207 (6th Cir. 1983); *H.C. Blackwell Co. v. Kenworth Truck Co.*, 620 F.2d 104, 107 (5th Cir. 1980); *Francis Chevrolet Co. v. General Motors Corp.*, 602 F.2d 227, 229 (8th Cir. 1979); *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir. 1978), *cert. denied*, 436 U.S. 946 (1978); *Rea v. Ford Motor Co.*, 497 F.2d 577, 585 (3d Cir. 1974), *cert. denied*, 419 U.S. 577 (1974). *See also Wooton Ent., Inc. v. Subaru of America, Inc.*, 34 Fed. Appx. 57, 62 (4th Cir. 2002) (unpublished).

As these decisions demonstrate, there simply is no conflict among the circuits regarding the "good faith" standard, and the Petition should therefore be denied.

2. Courts Have Uniformly Held That a Manufacturer's Use of Cars Outside Its Allocation System As Incentives For Dealer Conduct Is Not "Coercion" Under the ADDCA

Just as there is no conflict regarding the standard that applies, there is also no conflict among those courts that have considered the use of "extra" cars as incentives to dealers. Both of the lower courts held that the withholding of cars to which dealers are not entitled under SNE's allocation system in order to create incentives for additional purchases of accessories is not a wrongful demand accompanied by a threat of sanctions. In so holding, they expressly followed the fully consistent decisions of the only federal courts to have considered whether a manufacturer's use of such "extra" cars may constitute unlawful coercion. *Cabriolet Porsche Audi, Inc. v. American Honda Motor Corp.*, 773 F.2d 1193 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F. Supp. 2d 737 (D. Md. 1996), *aff'd mem.*, 121 F.3d 697 (4th Cir. 1997). Because the dealers had no entitlement to the discretionary or turndown cars, SNE's alleged practice of conditioning access to the cars based on purchases of accessories was not coercive. As the Eleventh Circuit held in *Cabriolet*:

> All American Honda did was suggest to Cabriolet a way to obtain extra cars – that is, more cars than Cabriolet was entitled to receive. This does not amount to coercion.

773 F.2d at 1210. There is no contrary authority in any federal court, and no conflict among the courts of appeal that would warrant the issuance of a writ of certiorari.

3. The First Circuit's Earlier Decision in *Rohlsen* Did Not Establish an Inconsistent Test for Bad Faith

Petitioners concede that the "wrongful demand/threat of sanctions" test adopted by the First Circuit in *Wallace Motor Sales* and applied by the courts below is appropriate under the statute. Petition, p. 11 ("Coercion under the ADDCA is defined as the manufacturer's wrongful demand accompanied by threat of sanctions.") Despite this concession, they argue that "[j]ust how coercion is to be defined is the critical aspect of this case." They further argue that "the generally accepted rule of what constituted coercion under the Act" was decided in "the seminal ADDCA case, *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966)." Petitioners' reliance on two sentences of dicta from a forty-year-old case misconstrues settled law and misstates *Rohlsen's* place in it.

The First Circuit in *Rohlsen* never purported to prescribe a test for bad faith, but simply discussed a type of conduct that would be "particularly suspect" under the Act. As the court explained unequivocally in this case:

> [A]ppellants' proferred 'test' is mere dicta; we merely explored two possible scenarios for a condition to constitute coercion under ADDCA's good-faith requirement. We never announced a test for coercion, and thus good faith, in *Rohlsen*.

Petition, p. 30. Indeed, Petitioners' characterization of *Rohlsen* as a "seminal case" defining "coercion" cannot be reconciled with the same court's statement nineteen years later in *Wallace Motor Sales* that "[t]his is the first time the meaning of [the ADDCA's 'good faith' provision] has come up for review in this circuit." 780 F.2d at 1056. The *Wallace*

Motor Sales standard of wrongful demand and sanction has been the standard in the First Circuit for twenty years, and the decision below does not represent "a radical change in settled law" as the Petitioners suggest. Petition, p. 17. Certiorari should not be based on a creative attempt to thrust on a precedent a significance it was never given and was never meant to have. Nor should it be based on an imagined inconsistency in the appellate decisions of a single circuit.

Petitioners' string cite of cases that quote *Rohlsen's* "mutual benefits" language does not demonstrate a conflict among the circuits. Petitioners cite appellate decisions from the Second and Tenth Circuits, but each of those courts subsequently adopted the same "wrongful demand/threat of sanctions" test applied by the court below. *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 95-96 (2d Cir. 1987); *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1379 (10th Cir. 1988). Indeed, four of the district court decisions and the one state court decision Petitioners cite explicitly apply the "wrongful demand/threat of sanctions" test. *See Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, 2000 U.S. Dist. LEXIS 22130, *22 (S.D.N.Y. Aug. 31, 2000); *General Motors Corp. v. Villa-Marin Chevrolet, Inc.*, 2000 U.S. Dist. LEXIS 2772, *55-56 (E.D.N.Y. Mar. 7, 2000); *K & H Kawasaki, Inc. v. Yamaha Motor Corp., U.S.A.*, 1997 U.S. Dist. LEXIS 5171, *13-14 (N.D.N.Y. April 14, 1997); *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F.Supp. 1121, 1134 (D.R.I. 1982), *aff'd*, 715 F.2d 10 (1st Cir. 1983); *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 792 N.E.2d 488, 497 (Ill. App. 2003). Most of these cases refer to the *Rohlsen* benefits language as simply one relevant factor in determining whether the "wrongful demand" prong of the two-prong test is met. This approach is not inconsistent with the decision below.

Petitioners' efforts to demonstrate an inconsistency by distinguishing the facts of *Cabriolet* and *Colonial Dodge* also fail. Petitioners argue that the manufacturers' conditions benefited the dealers in those cases, and that SNE's conditions benefited only SNE. No doubt, the dealer plaintiffs in those cases harbored the same belief that the action sought by the manufacturers did not benefit them as the Subaru dealers assert here. Indeed, the chart on page 16 of the Petition, in which Petitioners purport to compare the benefits to dealers present in *Cabriolet* and *Colonial Dodge* with the alleged lack of benefits to dealers present in this case, fails to account for the benefit to the dealer of gaining access to the extra cars to which the dealer was not entitled. The court of appeals, presented with the same chart, correctly observed that even under the *Rohlsen* language, "appellants fail to show that SNE's pre-accessorization practice lacks mutual benefit. Appellant dealers gained the additional benefit of cars that they were not otherwise entitled to receive and the additional profits that could be gained therefrom." Petition, p. 30. This is the same analysis applied by the Eleventh Circuit in *Cabriolet*. As that court held, the offering of extra cars to induce dealers to take desired actions amounts "to nothing more than 'recommendation, endorsement, exposition, persuasion, urging,' which under the federal act, 'shall not be deemed to constitute a lack of good faith.'" 773 F.2d at 1211. *See* 15 U.S.C. § 1221(e).

B. The Court Below Did Not Decide an Important Question of Federal Law that Should be Settled by This Court.

In addition to its consistency with uniform federal law, the court of appeals' application of the ADDCA's "good faith" provision to SNE's alleged accessorization practices does not implicate an important federal issue that merits this

Court's attention. Plaintiffs do not contend that the practices challenged in this case are being employed by other manufacturers. The Petition provides no basis for concluding that a decision by this Court would affect any other case or any other parties. It represents nothing more than a final effort by private litigants to salvage their monetary claims.

Even if this case concerned issues of importance to the automotive industry, however, the ADDCA is not the primary enforcement tool available to dealers. After passage of the ADDCA in 1956, states passed or amended their own statutes to regulate the relationships between automobile manufacturers and dealers in order to supplement the federal law. The state dealer laws regulate the relationships between automobile manufacturers and their dealers with more specificity than the federal act.

Petitioners argued below that the state laws' definitions of coercion were more protective of dealers than the ADDCA's definition. In support of that argument, they cited various authorities stating that the ADDCA did not provide sufficient protection to dealers, and that the states could, and did, "enact statutes that provided far more detailed regulation of automobile franchises than that contemplated by the ADDCA. . . ." Brief of Plaintiffs-Appellants, pp. 39-40.

The National Automobile Dealers Association ("NADA") submitted a Brief of Amicus Curiae in the Court of Appeals in support of the Petitioners in which it made a similar argument. NADA (which includes on its Board of Directors one of the Petitioners in this case) argued that automobile manufacturers dominated the franchise relationship from the 1920s to the 1950s, that this dominance allowed them to take unfair advantage of dealers, and that

dealers were unable to stop these practices through the application of contract law. According to NADA, the inability of the dealers to use contract doctrines to prevent unfair practices resulted in the passage of federal and state dealer laws. In its amicus brief in the court below, NADA argued:

> These unsuccessful attempts forced the dealers to turn to Congress and the state legislatures for protection. A principal target of these attempts was manufacturer coercion to force dealers to take unwanted vehicles, parts and accessories. . . . However, attempts to have this practice expressly declared illegal by Congress were unsuccessful. . . . Instead, Congress enacted the Automobile Dealer Day in Court Act, 15 U.S. C. §§ 1221 et seq., in 1956, which only generally protected dealers from acts of coercion or intimidation by manufacturers.
>
> After passage of ADDCA, the dealers were still unsatisfied, so they turned to the state legislatures seeking more specific protections. . . . Here, the dealers had more success in obtaining statutory protection against being coerced to order unwanted vehicles, parts and accessories. Today, there are laws that expressly prohibit manufacturers from coercing or requiring dealers to order unwanted vehicles, parts and accessories enacted in at least 35 states.

Brief of Amicus Curiae, pp. 6-7 (citations and footnote omitted).

Although the courts below correctly held that the definition of "coercion" under the applicable state statutes is identical to the definition of "coercion" under the ADDCA, neither the state legislatures nor the state courts

are bound by the ADDCA when interpreting their own laws. The availability of more pervasive state legislative schemes to protect dealer rights further limits the importance of the federal issues presented, and makes this case particularly unsuited for this Court's discretionary review.

Nor does the Act's legislative history assist the Petitioners. The House Report's reference to requirements by manufacturers that their dealers "sell a specified quota of parts, accessories, and tools made or approved by the manufacturer" has nothing to do with this case, where there is no allegation and no evidence that SNE imposed quotas or prohibited dealers from purchasing accessories from third parties. H.R. Rep. No. 84-2850 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4596, 4603. Similarly, although the House Report refers to Congress' concern over manufacturers' pressuring dealers to accept unwanted automobiles, parts, accessories, or supplies, it goes on to state that such pressure "may in appropriate instances constitute coercion or intimidation." *Id.* Because Congress did not describe the circumstances that would give rise to a claim of coercion, the passage Petitioners partially quote adds no support to their contentions. Rather, the statute and the legislative history demonstrate that Congress was concerned only with manufacturers' coercing dealers to purchase unwanted products. They do not evidence any concern over the bargaining that takes place when a manufacturer offers a dealer one product as an incentive to purchase another. This type of bargained-for exchange, which dealers are free to decline, reflects precisely the balance between prohibiting coercion and preserving freedom of contract that is reflected in both the language and the legislative history of the ADDCA.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MOTION FILED
JUN 3 - 2005

No. 04-1465

In the Supreme Court of the United States

GEORGE LUSSIER ENTERPRISES, INC., d/b/a LUSSIER SUBARU; SULLIVAN COUNTY MOTORS, INC. d/b/a SUBARU OF CLAREMONT; CAMILLERI BROS., INC. d/b/a C&C SUBARU; KINNEY MOTORS, LTD. and REYNOLDS GARAGE & MARINE, INC.,

Petitioners,

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH, JR. and JOSEPH APPELBE,

Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF BY NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Under Rule 37.2 of the Rules of the Court, the National Automobile Dealers Association ("NADA") moves for leave to file an amicus curiae brief in support of petitioners' petition for writ of certiorari. Consent from petitioners' counsel has been granted. Consent from respondents' counsel has been sought and denied.

NADA was founded in 1917 and is a non-profit national trade association of new motor vehicle dealers. It has over 20,000 members and represents over 43,000 separate franchises located in all 50 states. NADA appears as amicus curiae frequently in cases that raise important issues to its members or their customers.

In the United States, franchised dealers employ over 1.1 million people. In 2004, the average dealership had 52 employees and the annual payroll for all dealerships nationwide totaled $50.5 billion, representing almost 13 percent of the nation's total retail trade payroll. As these numbers reveal, motor vehicle dealers fuel a significant portion of the U.S. economy.

NADA members are protected by franchise laws enacted by Congress, which includes the statute at issue in this case, as well as state motor vehicle laws enacted in all 50 states. It is well established that these laws were promulgated in recognition of the "disparity of bargaining power between automobile manufacturers and their dealers" and that they were "intended to protect retail car dealers from abusive and oppressive acts by manufacturers." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978). NADA members have an obvious interest in the manner in which the courts construe these laws.

In this case, the issue before the Supreme Court is whether the Court of Appeals for the First Circuit erred in holding that the test for "coercion" under the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225, is based solely on contractual rights.

NADA believes that a "contractual rights" test for coercion contradicts Congress' intent of preventing manufacturers from abusing their superior bargaining power by drafting one-sided franchise agreements that permit them to take unfair advantage of their dealers. Moreover, the case law demonstrates that there is a split among the circuit courts regarding the proper test for "coercion" under the Act, including what constitutes a "wrongful demand" and what constitutes a "sanction."

Because NADA members are affected directly and materially by the interpretation of the federal statute at issue, NADA has monitored its development, amendment and enforcement since it was enacted in 1956. As a result, NADA's experiences give it a unique perspective from which to assist the Supreme Court on this important and conflicting issue of the interpretation of this federal statute, which affects a major economic industry in the United States.

Accordingly, NADA respectfully requests that the Court grant its motion for leave to file an amicus curiae brief in support of petitioners' petition for writ of certiorari.

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QUESTION PRESENTED

Is "coercion" by a motor vehicle manufacturer, which is prohibited under the Automobile Dealer Day in Court Act, 15 U.S.C. §§ 1221-1225, limited only to a violation of a motor vehicle dealer's contractual rights?

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INTEREST OF THE AMICUS CURIAE

The interest of amicus curiae National Automobile Dealers Association has been described in the preceding motion for leave to file this brief in support of petitioners' petition for writ of certiorari.[1]

STATEMENT OF THE CASE

The Decision Below

The Court of Appeals for the First Circuit held in this case that a motor vehicle manufacturer does not violate the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225, when it withholds desired vehicles from its dealers in an attempt to force the dealers to purchase unwanted accessories. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36 (1st Cir. 2004); Petitioners' App. at 20. The First Circuit held that such conduct was not coercion under the Act unless the dealers had a contractual right to the vehicles withheld. *Id.* The First Circuit denied en banc review.

Statutory Background

In 1956, Congress enacted the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225. The ADDCA gives automobile dealers the right to recover damages from manufacturers who fail "to act in good faith in performing

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[1] Pursuant to Rule 37.6 of the Rules of the Court, counsel for the amicus curiae states that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus curiae, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer." 15 U.S.C. § 1222.

"Good faith" is defined as "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimation, or threats of coercion or intimation from the other party." 15 U.S.C. § 1221(e). However, "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." *Id.*

As the Court of Appeals for the Tenth Circuit has pointed out, Congress explained that under the ADDCA:

> "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. *For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation.* Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer."

American Motors Sales Corp. v. Semke, 384 F.2d 192, 196 (10th Cir. 1967) (quoting 1956 U.S. Code Cong. & Admin. News, p. 4603) (emphasis added).

The legislative history of the ADDCA shows that its purpose was to provide a federal cause of action and a counterweight to one-sided franchise contracts. H.R. REP. NO. 2850, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Admin. News, p. 4596. Recognizing this legislative intent, circuit courts have held that Congress

enacted the ADDCA to create a new level of protection that does not depend on contract terms. *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 710 (10th Cir. 1970); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 646 (3d Cir. 1964).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the First Circuit erred in holding that the test under Automobile Dealers Day in Court Act, 15 U.S.C. § 1221-1225, for a coercive sanction is based solely on contractual rights. Moreover, the case law demonstrates that there is disagreement among the circuit courts regarding the proper test for "coercion" under the Act. Although the circuit courts generally agree that coercion requires a "wrongful demand" that will result in "sanctions," they disagree as to the meaning of these terms. By granting the petition for writ of certiorari, the Supreme Court can eliminate the disparate judicial results and formulate a uniform test for coercion under this important federal statute.

REASONS FOR GRANTING THE WRIT

I. INCONSISTENT CIRCUIT COURT HOLDINGS AS TO THE TEST FOR "COERCION"

United States Supreme Court review of the decision by the Court of Appeals for the First Circuit is needed to clarify the "coercion" element of the Automobile Dealers Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-1225, particularly as that element relates to a manufacturer withholding desired vehicles in an attempt to force dealers to do something that benefits the manufacturers, but not necessarily the dealers. This practice has been addressed in lower federal court rulings on many occasions since the ADDCA's enactment nearly 50 years ago, however, with disparate results. This case presents an opportunity for the Supreme Court to resolve the conflicts among the circuit courts concerning an important federal statute that

governs an industry that has a significant impact on the United States economy.

Other than acknowledging that the purpose of the ADDCA is to protect motor vehicle dealers from abuses arising from a manufacturer's superior bargaining power, *see New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 & n.4 (1978), the Supreme Court has never had an occasion to construe or apply the ADDCA. As explained earlier, the circuit courts have held generally that a lack of good faith under the ADDCA requires a showing of "coercion." *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049 (1st Cir. 1985); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir. 1963), *cert. denied*, 375 U.S. 896 (1963); *Minson Plymouth, Inc. v. Chrysler Motors Corp.*, 554 F.2d 1266 (4th Cir. 1977); *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir. 1970). Moreover, circuit courts have established a fairly uniform test for "coercion," construing it as requiring a "wrongful demand" by the manufacturer that will result in "sanctions" if ignored by the dealer. *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir. 1978), *cert. denied*, 436 U.S. 946 (1978); *Wallace Motor Sales*, 780 F.2d at 1056.

Although there is general agreement about the two components of the coercion test, material disagreements exist among the circuit courts concerning what constitutes a "wrongful demand" and what constitutes "sanctions."

II. CONFLICT AMONG CIRCUIT COURTS AS TO "WRONGFUL DEMAND"

Some circuit courts have adopted a test to determine whether a manufacturer's demand is coercive by deciding whether a dealer's compliance with a manufacturer's demand benefits only the manufacturer or both parties. In *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 442 (1st Cir. 1966), *cert. denied*, 385 U.S. 919 (1966), the First Circuit noted that, when a dealer's compliance with a manufacturer's demand would "benefit only, or primar-

ily, the manufacturer," the demand was "[p]articularly suspect." This is known as the one-sided benefit test.

Although the First Circuit now labels its one-sided benefit test as dicta, *see George Lussier*, 393 F.3d at 45; Petitioners' App. at 30, the test has been adopted by several circuit courts, including the Eleventh and Second Circuits. *See Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (distributor's "suggestion did not present a [demand] which benefit[ed] only, or primarily, the manufacturer'") (quoting *Rohlsen*, 360 F.2d at 442); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 561-62 (2d Cir. 1970) (demand that benefits only the manufacturer is "'[p]articularly suspect,' [and] can be easily extorted by the manufacturer at the dealer's expense") (quoting *Rohlsen*, 360 F.2d at 442). In addition, as petitioners point out in their petition, numerous district courts have followed suit and adopted the one-sided benefit test enunciated in *Rohlsen*. *See* Petitioners' Pet. for Writ of Cert. at 12-13 (collecting cases).

The fact that the First Circuit subsequently disavowed its own one-sided benefit test coupled with the fact that other courts have since adopted it only underscores the need for Supreme Court review. Moreover, whether the one-sided benefit test is adopted does not put an end to the disagreement because, unlike the First Circuit in this case, other circuit courts have construed a demand that requires a dealer to buy unwanted vehicles or accessories to be a wrongful demand and, hence, coercion under the ADDCA.

One of the principal evils that the ADDCA was designed to stop was the exertion of pressure by manufacturers on dealers to buy unwanted vehicles, parts, accessories or supplies. *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir. 1962), *cert. denied*, 369 U.S. 887 (1962) ("'The principal effect of the bill . . . is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation or threats of coercion or intimidation.'") (citing S. REP. NO.

2073, 84th Cong., 2d Sess. 2); *see also American Motors Sales Corp. v. Semke*, 384 F.2d 192, 196 (10th Cir. 1967) ("'manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation'") (quoting 1956 U.S. Code Cong. & Admin. News, p. 4603).

Unlike the First Circuit's holding in this case, other circuit courts have held that a manufacturer's demand that a dealer buy unwanted vehicles or accessories constitutes a wrongful, coercive demand under the ADDCA. *See, e.g., David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 56 & n.7 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) ("it now appears to be settled that a manufacturer's coercive attempt to force unwanted automobiles on a dealer constitutes bad faith dealing for purposes of the Act"); *American Motors Sales*, 384 F.2d at 196-97 (manufacturer's demand that the dealer order unwanted cars in order to receive desired cars was coercive).

Moreover, at least 35 states expressly prohibit manufacturers from coercing dealers into buying unwanted vehicles, parts or accessories.[2] The First Circuit held in this case and several other circuit courts have held in other cases that the standard for coercion under the ADDCA is

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[2] Ala. Code § 8-20-4; Ariz. Rev. Stat. § 28-4458; Ark. Code § 23-112-403; Cal. Code § 11713.2; Colo. Rev. Stat. § 12-6-120; Conn. Gen. Stat. § 42-133bb; Del. Code. § 4913; Ga. Code § 10-1-661; Idaho Code § 49-1613; 815 Ill. Comp. Stat. 710/4; Ind. Code § 9-23-3-8; Ky. Rev. Stat. § 190.070; Me. Rev. Stat. § 1174; Mass. Gen. Laws ch. 93B, § 4(b); Mich. Comp. Laws § 445.1573; Minn. Stat. § 80E.12; Miss. Code § 63-17-73; Mo. Rev. Stat. § 407.825; Mont. Code § 61-4-208; Neb. Rev. Stat. § 60-1436; Nev. Rev. Stat. § 5; N.H. Rev. Stat. § 357-C:3; N.M. Stat. § 57-16-5; N.Y. Law § 463; N.C. Gen. Stat. § 20-304; Ohio Rev. Code § 4517.41; Or. Rev. Stat. § 650.130; Pa. Cons. Stat. § 12; R.I. Gen. Laws § 31-5.1-3; S.C. Code § 56-15-30; Utah Code § Part 2; Vt. Stat. tit. 9, § 4096; Va. Code § 46.2-1569; W. Va. Code § 17A-6A-10; Wis. Stat. § 218.0116(1)(h).

the same as the standard under state law. *George Lussier*, 393 F.3d at 47 (collecting cases); Petitioners' App. at 32; *see also Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876 (5th Cir. 1989), *cert. denied*, 493 U.S. 978 (1989); *Gage v. General Motors Corp.*, 796 F.2d 345, 350-51 (10th Cir. 1986). However, the state laws provide expressly that a manufacturer demand that dealers buy unwanted vehicles, parts or accessories as a wrongful demand and improper.

As a result, the debate extends beyond the circuit courts and implicates the interpretation of state law as well.[3] Logically, if the test for coercion under the ADDCA is equivalent to the test under these state laws, a demand that dealers buy unwanted accessories that is deemed wrongful under state law must also be wrongful under the ADDCA.

III. CONFLICT AMONG CIRCUIT COURTS AS TO "SANCTIONS"

Circuit court holdings have been particularly disparate in cases in which a manufacturer engages in the practice of withholding desired automobiles from dealers in an attempt to force the dealers to take some action that they would not take otherwise. As with unwanted accessories, the circuit courts are at loggerheads over the meaning of "sanctions" in this situation.

For example, withholding desired automobiles has been held to be a sanction in *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967); *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir. 1974), *cert. denied*, 419 U.S. 868 (1974); *David R. McGeorge Car Co. v. Leyland Motors Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974) *cert. denied*, 420

[3] To the extent that the First Circuit's contractual rights test is deemed the test for coercion, NADA contends that state statutes apply a broader standard. However, petitioners do not challenge the First Circuit's ruling that the test for coercion is the same under the ADDCA and state laws. Therefore, NADA accepts that ruling for purposes of this brief.

U.S. 992 (1975); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir. 1976); *Junikki Imports, Inc. v. Toyota Motor Co.*, 335 F. Supp. 593 (N.D. Ill. 1971); *Evanston Motor Co. v. Mid-Southern Toyota Distributors, Inc.*, 436 F. Supp. 1370 (N.D. Ill. 1977); *Speed Auto Sales, Inc. v. American Motors Corp.*, 477 F. Supp. 1193 (E.D.N.Y. 1979). However, withholding desired automobiles has been held not to be a sanction in *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir. 1967), *cert. denied*, 389 U.S. 832 (1967); *Overseas Motors, Inc. v. Import Motors, Ltd.*, 519 F.2d 119 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975); *Colonial Dodge, Inc. v. Chrysler Corporation*, 11 F. Supp. 2d 737 (D. Md. 1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997).

In this case, the First Circuit held that withholding desired vehicles was not coercion unless the dealers could show that they were contractually entitled to the vehicles withheld. *George Lussier*, 393 F.3d at 44; Petitioners' App. at 27. However, this holding defies Congress' intent in enacting the ADDCA, which was to protect dealers from abusive and oppressive acts by manufacturers that result from the manufacturer's superior bargaining power over its dealers. *Orrin W. Fox*, 439 U.S. at 100-01 & n.5. The imbalance in bargaining power allows a manufacturer to draft a franchise agreement with terms most favorable to it and the dealer has no choice but to accept the agreement without changes. *See, e.g.*, STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 9 (1966); Harold Brown and Jerry Cohen, *Franchising; Constitutional Considerations for "Good Cause" State Legislation*, 16 HOUS. L. REV. 21, 26 (1978-79); Harold Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. INDUS. & COMM. L. REV. 757, 769 (1971).

As a result of this well-known power imbalance, the ADDCA created a new level of protection for dealers that does not depend on contract terms. *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 710 (10th Cir. 1970) (ADDCA creates a new cause of action, other than breach of contract, that did not exist before); *see also Globe Motors, Inc.*

v. Studebaker-Packard Corp., 328 F.2d 645, 646 (3d Cir. 1964) (ADDCA "did not provide a new remedy for breach of contract but created a new cause of action"). By making a violation of the ADDCA dependent on showing that the manufacturer breached its contractual obligations, the First Circuit has eviscerated the ADDCA and rendered it meaningless. Moreover, the First Circuit's holding conflicts with the holdings of the Third and Tenth Circuits. *Id.*

The facts in this case show that the dealers were required to purchase unwanted accessories (which is a "wrongful demand") or be denied access to over 30% of the total supply of vehicles that Subaru of New England made available to its dealers (which is a "sanction"). There is no evidence that the dealers voluntarily agreed that Subaru of New England could withhold 30% of its total vehicle allocation from dealers who did not purchase unwanted accessories. Subaru of New England exploited its superior bargaining power to create a substantial pool of desired vehicles to use for this purpose. Because manufacturers unilaterally control the allocation of vehicles to their dealers, it is virtually impossible for dealers to have a contractual right to any specific vehicles.

Notwithstanding the absence of a contractual right, the manufacturer's control over the supply of vehicles is an "important sanction" that the manufacturer can use to force its will on its dealers. MACAULAY, *supra*, at 12. The motor vehicle franchise system allows manufacturers to avoid the large capital investment in sales outlets and service facilities necessary to render consumer demanded services by shifting these investment costs to their dealers. *See, e.g.*, Note, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Compensation*, 33 VAND. L. REV. 385, 387 (1980); MACAULAY, *supra*, at 6. Large capital investments make the dealer dependent on the manufacturer and subject to the manufacturer's dictates, whether or not they are fair or reasonable. MACAULAY, *supra*, at 11-12; BROWN, *supra*, at 760-61. Whether a dealer receives "an appropriate selection of different types of cars and trucks" from the manufacturer

directly affects its return on investment. MACAULAY, *supra*, at 6. Moreover, it is well known that franchise agreements obligate the dealer to "sell as many cars as dealers in similar areas sell." *Id.* at 7.

In this case, the dealer agreements drafted by Subaru of New England provide that each dealer must achieve "a level of registrations on an annual basis in the dealer's area of responsibility reasonably comparable, in respect of import make automobile market penetration, to that attained *on the average* by all other dealers appointed by distributor in their respective areas of responsibility." Court of Appeals App. at 1003 (emphasis added); *see also George Lussier*, 393 F.3d at 41 ("Essentially, the more cars the dealer sold, the more cars they would earn in future allocations."); Petitioners' App. at 22. Therefore, if a dealer receives less than the average supply of vehicles relative to the registrations in its market, the dealer may not achieve average sales performance, which, in turn, makes the dealer's franchise vulnerable to cancellation by the manufacturer.

Because of the substantial capital investments and contractual obligations needed to achieve average sales performance, dealers have no real choice other than to do what is necessary to have full access to the entire pool of motor vehicles that the manufacturer supplies to its dealers. Thus, it is coercion for a manufacturer to withhold a substantial portion of that pool from dealers who choose not to buy unwanted accessories. Recognizing this reality, the Supreme Court has held previously that "discrimination in the shipment of automobiles, as a means of influencing dealers to use [the manufacturer's wholly owned credit subsidiary]" was a practice that "fall[s] within the common understanding of 'coercion'. . . ." *Ford Motor Co. v. United States*, 335 U.S. 303, 317 (1948).

The appropriate test for coercion should be whether the alleged coercive conduct leaves the dealers with no choice but to comply with the manufacturer's wrongful demand. Such a test is consistent with the common meaning of the term "coercion," particularly with respect to economic

coercion, which presumably is what Congress had in mind when it enacted the ADDCA.[4] The word "coerce" means:

> to restrain, control, or dominate, mollifying individual will or desire (as by force, power, violence, or intimidation) . . . to compel to an act or choice by force, threat, or other pressure . . . to effect, bring about, establish or enforce by force threat, or other pressure.

WEBSTER'S THIRD NEW INTERN'L DICTIONARY 439 (1986). The common definition includes the use of economic pressure to compel someone to do what he or she would not choose to do otherwise.

Because the circuit courts disagree as to what constitutes a "wrongful demand" and what constitutes "sanctions" as those terms are used to describe coercion under the ADDCA, this case presents an opportunity for the Supreme Court to clarify the law and ensure consistent legal holdings throughout the circuit courts.

CONCLUSION

The Court of Appeals for the First Circuit erred in holding that the test for "coercion" under the Automobile Dealers Day in Court Act is based solely on contractual rights. Moreover, the case law demonstrates that there is a disagreement among the circuit courts regarding the proper test for coercion under the Act. Accordingly, the Supreme Court should grant petitioners' petition for writ of certiorari in order to formulate a consistent and uniform test for this important federal statute.

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[4] The legislative history of the ADDCA focuses on the economic coercion that dealers suffer at the hands of manufacturers after the dealers have made substantial capital investments in facilities, equipment and training to represent the manufacturer's products, as opposed to physical coercion. *See, e.g.*, MACAULAY, *supra*, at 5-12; BROWN, *supra*, at 760-61.

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